# DOCKET

No. 87-2012-CFX Status: GRANTED

Title: FW/PBS, Inc., dba Paris Adult Bookstore II, et al.,

Petitioners

City of Dallas, et al.

Docketed: June 9, 1988

Court:

United States Court of Appeals

for the Fifth Circuit

Vide:

87-2051 88-49

Counsel for petitioner: Schwartz, Arthur M.

Counsel for respondent: Dippel, Kenneth C., Muncy, Analeslie

Entry	, [	ate	N	lote	Proceedings and Orders
2	Apr	14	1988		Application for recall and stay filed.
			1988		Temporary stay granted by Justice White, pending
					manage due April 75.
4	Apr	20	1988		Application referred to Conference by Justice White,
					1mmil 20
5	Apr	25	1988		Response of City of Dallas, et al. received.
6	Apr	25	1988		Description of Manno Tamore, Inc., et al. received.
7	Apr	25	1988		Response of Citizens for Decency through Law, Inc.,
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	Ann	26	1988		Response of Berry, Patel, Fernandez, and Dallas Motel
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	96-11		1000		manage stay wacated, application for stay GRANTED by
9	may		1988		Court with order pending timely filing and disposition
					of petition for certiorari.
-					nable of certificati filed.
1	Jun	9	1988	6	Brief of respondents Dallas, Texas, et al. in opposition
10	Jul	13	1988		441-4
				_	Watter of Citizens For Decency Through Law, Inc. for
11	Jul	13	1988	G	leave to file a brief as amicus curiae in No. 87-2012
					filed.
12	Jul	. 29	1988		DISTRIBUTED. September 26, 1988
13	Aug	8	1988	X	Reply brief of petitioners FW/PBS, etc., et al. filed.
14	Feb	21	1989		SPRIGHDIBITED VARIABLY 24, A302
15	Feb	27	1989		Motion of Citizens For Decency Through Law, Inc. for
			-		leave to file a brief as amicus curiae in No. 87-2012
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					consolidated with 87-2051 and 88-49, and a total of one
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17	Mai	r 10	1989		Record filed. Certified original record and proceedings, 15 volumes,
					Certified original record and proceedings
					received. (Vide: 87-2051 and 88-49).
18	Apr	r 11	1989	9	Joint appendix filed. VIDED.
21	Ap	r 11	1989	9	Brief of petitioners FW/PBS, etc., et al. filed.
19	AD	r 13	1989	9	Brief amicus curiae of PHE, Inc. filed.

Entry		Date	No	Proceedings and Orders
20	Apr	13	1989	Brief amici curiae of American Booksellers Association, Inc., et al. filed.
22	May	11	1989	Brief amicus curiae of American Family Association, Inc.
24	Jun	5	1989	Order extending time to file brief of respondent on the merits until July 21, 1989.
25	Jul	20	1989	SET FOR ARGUMENT WEDNESDAY, OCTOBER 4, 1989. (1ST CASE)
			1989	Brief amicus curiae of Children's Legal Foundation filed.
27	Jul	20	1989/	Brief of respondents City of Dallas. et al. filed. VIDED.
			1999	Brief amicus curiae of Natl. Institute of Municipal Law Officers filed.
29	Jul	21	1989	Brief amici curiae of U.S. Conference of Mayors, et al. filed. VIDED.
30	Jul	27	1989	CIRCULATED.
31	Aug	18	1989 X	Reply brief of petitioners FW/PBS, etc., et al. filed.
32	Sop	26	1989	Record filed.
				Certified exhibits received. (Vide: 87-2051 & 88-49).
33	Oct	4	1989	ARGUED.

# PETITION FOR WRIT OF CERTIORAR

87-2012

IN THE SUPREME COURT OF THE UNITED October Term, 1987

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FW/PBS, INC., a Texas Corporation, d/b/a PARIS ADULT. BOOKSTORE II; FW/PBS, INC., a Texas Corporation, d/b/a PARIS ADULT VIDEO CENTER; FW/PBS, INC., a Texas Corporation, d/b/a FILMWORLD; DSB, INC., a Texas Corporation, d/ b/a DENMARK BOOKSTORE; CHARLES E. CARLOCK. d/b/a PARIS ADULT BOOKSTORE I: LONE STAR MULTI THE-ATRES, INC., a Texas Corporation, d/b/a NEW FINE ARTS ADULT THEATRE; LONE STAR MULTI THEATRES, INC., a Texas Corporation, d/b/a LA CAGE; BEVERLY K. VAN DUSEN d/b/a LONE STAR BOOKSTORE; BEVERLY K. VAN DUSEN, d/ b/a ELITE BOOKSTORE; BILL STATEN, JR., d/b/a ROYAL LANE BOOKSTORE; BILL STATEN, JR., d/b/a NEW VEN-TURE VIDEO; BILL STATEN, JR., d/b/a MOCKINGBIRD LANE NEWS; Bi-Ti ENTERPRISES, INC., d/b/a RED LETTER NEWS; GATTIE CORPORATION, d/b/a FANTASYLAND; GAT-TIE CORPORATION, d/b/a VIDEOLAND ARCADE; GATTIE CORPORATION, d/b/a VIDEOSTOP; J.R.E. ENTERPRISES, d/ b/a KAZBAH BOOKSTORE: ENTERTAINMENT UNLIMITED. d/b/a EROS DALLAS. Petitioners.

VS.

THE CITY OF DALLAS, a Texas Incorporated Municipality: A: STARKE TAYLOR, Mayor of the City of Dallas in his representative capacity only; BILLY PRINCE, Chief of Police of the City of Dallas, in his representative capacity only. Respondents.

#### PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Attorneys for Petitioners

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#### QUESTIONS PRESENTED FOR REVIEW

- I. Does the Dallas sexually oriented business license ordinance impose an unconstitutional prior restraint on protected expression by providing for the denial or revocation of a license to engage in protected First Amendment activity on the basis of prior criminal convictions, including misdemeanor obscenity convictions, contrary to Vance v. Universal Amusements, 445 U.S. 308 (1980)?
- II. Does the Dallas sexually oriented business license ordinance inevitably single out persons and businesses engaged in First Amendment protected activities for regulation and closure through the denial or revocation of a license contrary to Arcara v. Cloud Books, 478 U.S. —, 92 L.Ed.2d 568, 106 S.Ct. 3175 (1986)?
- III. Does the Dallas sexually oriented business license ordinance violate the First and Fourteenth Amendments by failing to provide the procedural safeguards required by Freedman v. Maryland, 380 U.S. 51 (1965), National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977) and Vance v. Universal Amusement Co., 445 U.S. 308 (1980) after the denial or revocation of a license to present protected expression that results in a prior restraint?
- IV. Are the zoning provisions of the Dallas sexually oriented business license ordinance unconstitutional for restricting access to constitutionally protected speech by requiring previously existing businesses to close and by failing to provide a reasonable opportunity for those businesses to operate?

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#### IN THE SUPREME COURT OF THE UNITED STATES October Term, 1987

No.	

FW/PBS, INC., a Texas Corporation, d/b/a PARIS ADULT: BOOKSTORE II; FW/PBS, INC., a Texas Corporation. d/b/s. PARIS ADULT VIDEO CENTER; FW/PBS, INC., a Texas Corporation, d/b/a FILMWORLD; DSB, INC., a Texas Corporation, d/b/a DENMARK BOOKSTORE; CHARLES E. CARLOCK, d/b/a PARIS ADULT BOOKSTORE I: LONE STAR MULTI THEATRES, INC., a Texas Corporation, d/b/a NEW FINE ARTS ADULT THEATRE; LONE STAR MULTI THEATRES, INC., a Texas Corporation, d/b/a LA CAGE; BEVERLY K. VAN DUSEN d/b/a LONE STAR BOOK-STORE: BEVERLY K. VAN DUSEN, d/b/a ELITE BOOK-STORE; BILL STATEN, JR., d/b/a ROYAL LANE BOOK-STORE; BILL STATEN, JR., d/b/a NEW VENTURE VIDEO; BILL STATEN, JR., d/b/a MOCKINGBIRD LANE NEWS; Bi-Ti ENTERPRISES, INC., d/b/a RED LETTER NEWS: GATTIE CORPORATION, d/b/a FANTASYLAND; GATTIE CORPORATION, d/b/a VIDEOLAND ARCADE; GATTIE CORPORATION, d/b/a VIDEOSTOP; J.R.E. ENTERPRISES, d/b/a KAZBAH BOOKSTORE; ENTER-TAINMENT UNLIMITED, d/b/a EROS DALLAS,

Petitioners,

VS.

THE CITY OF DALLAS, a Texas Incorporated Municipality; A. STARKE TAYLOR, Mayor of the City of Dallas in his representative capacity only; BILLY PRINCE, Chief of Police of the City of Dallas, in his representative capacity only,

Respondents.

#### PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

#### LIST OF PARTIES BELOW

#### **PETITIONERS**

FW/PBS., Inc. d/b/a Paris Adult Bookstore II, a Texas Corporation

FW/PBS, Inc., d/b/a Paris Adult Video Center, a Texas Corporation

FW/PBS, Inc., d/b/a Filmworld, a Texas Corporation

DSB, Inc. d/b/a Denmark Bookstore, a Texas Corporation

Charles E. Carlock, d/b/a Paris Adult Bookstore I

Lone Star Multi Theatres, Inc., d/b/a New Fine Arts Adult Theatre, a Texas Corporation

Lone Star Multi Theatres, Inc. d/b/a La Cage, a Texas Corporation

Beverly K. Van Dusen, d/b/a Lone Star Bookstore

Beverly K. Van Dusen, d/b/a Elite Bookstore

Bill Staten, Jr., d/b/a Royal Lane Bookstore

Bill Staten, Jr., d/b/a New Venture Video

Bill Staten, Jr., d/b/a Mockingbird Lane News

BI-TI Enterprises, Inc., d/b/a Red Letter News, a Texas Corporation

Gattie Corporation, d/b/a Fantasy Land, a Texas Corporation

Gattie Corporation, d/b/a Video Land Arcade, a Texas Corporation

Gattie Corporation, d/b/a Video Stop, a Texas Corporation

J.R.E. Enterprises, d/b/a Kazbah Bookstore

Entertainment Unlimited, d/b/a Eros Dallas

## OTHER APPELLANTS IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Calvin Berry, III
Saujay Patel
Rudolph Fernandez
Dallas Motel Association
Tempo Tamers, Inc., a Texas Corporation
Corporation Lex, Inc., a Texas Corporation
M.J.R., Inc., a Texas Corporation
Southern Belles Partnership, Inc., a Texas Corporation
S.B. LaBare, Inc., a Texas Corporation
S.B. Youngbloods, Inc., a Texas Corporation
D. Burch, Inc., a Texas Corporation
De Ja Vu, Inc., a Texas Corporation
Allen & Burch, Inc., a Texas Corporation

#### **DEFENDANTS-APPELLEES:**

The City of Dallas, Texas

Honorable Starke Taylor, Former Mayor of the City of Dallas

Chief Billy Prince, Former Chief of Police of the City of Dallas

#### AMICUS CURIAE:

Citizens for Decency Through Law, Inc. (CDL), an Ohio non-profit corporation headquartered in Phoenix, Arizona

#### **OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on February 12, 1988 and is attached hereto in Appendix A. This opinion is reported as FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298 (5th Cir. 1988). The order denying the Petition for Rehearing and Suggestion for Rehearing En Banc is printed in Appendix B.

The opinion and judgment of the United States District Court for the Northern District of Texas (Dallas Division) was entered on September 12, 1986 and is reproduced in Appendix F. The opinion was reported sub nom Dumas v. City of Dallas, 648 F.Supp. 1061 (N.D. Tex. 1986).

#### JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 12, 1988. A timely filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 14, 1988. Appendix B. This Petition for Certiorari was filed within ninety days of that date.

The Fifth Circuit Court of Appeals' decision is a final judgment since it affirmed the final judgment of the United States District Court which upheld the constitutionality of the Dallas sexually oriented business license ordinance, Dallas Municipal Code, Chapter 4l against First Amendment challenge. Therefore, this Court has jurisdiction in this civil action pursuant to 28 U.S.C. Section 2101(c).

#### CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment One

Congress shall make no law... abridging the freedom of speech, or of the press...

United States Constitution, Amendment Fourteen

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

#### Provisions of the Dallas Municipal Code

Dallas Revised Municipal Code Chapter 41 et. seq., enacted June 18, 1986 together with amendments to Chapter 41 enacted on October 12, 1986 are set forth verbatim at Appendices G and H to this Petition.

#### STATEMENT OF CASE

Petitioners are engaged, at least in part, in what has been commonly referred to as the "adult entertainment business." Each of Petitioners operate its business in the City of Dallas, Texas, and each Petitioner sells, exhibits, or distributes publications, video or motion picture films. The materials sold or exhibited by Petitioners are presumptively protected speech material as guaranteed by the First and Fourteenth Amendments to the United States Constitution. These materials are made available in their various forms to consenting adults only.

On June 18, 1986, the City of Dallas, Texas, acting through its City Council, amended Dallas City Code, Chapter 41 ("sexually oriented businesses") by enacting Ordinance No. 19196. The added chapter, recently enacted and referred to herein, provides definitions for alleged "sexually oriented businesses," establishes an all-encompassing licensing and regulatory system for alleged "sexually oriented businesses," and provides a comprehensive scheme for enforcement of the ordinance. A copy of Ordinance No. 19196 is reprinted in Appendix G.

Petitioners filed the instant action challenging the constitutionality of Dallas City Code Chapter 4lA which established a licensing and zoning scheme regulating "sexually oriented businesses." Petitioners sought preliminary and permanent injunctive relief as well as declaratory relief.

Pursuant to the District Court's order, Petitioners' constitutional claims were resolved through cross-motions for summary judgment. After a hearing, the court on September 12, 1986 upheld the constitutionality of the ordinance with the exceptions of Dallas City Code Sections 41A-5(a)(8), 41A-5(c), part of 41A-5(a)(10) ("under indictment"), and 41A-5(a)(10)(A)(iii), (vi-ix). The aforementioned sections were declared unconstitutional and were severed from the remainder of the ordinance which was held constitutional. Dumasy. City of Dallas, 648 F.Supp. 1041 (N.D. Tex. 1986).

Specifically, the District Court upheld the provisions, inter alia, that provided for the denial or revocation of a sexually oriented business license for the conviction of a criminal offense, including an obscenity conviction. Section 41-5(A)(10) provides that issuance of a sexually oriented business license will be denied if "an applicant or an applicant's spouse has been convicted of a crime" listed in the ordinance. These crimes include:

(aa) prostitution;

(bb) promotion of prostitution;

(cc) aggravated promotion of prostitution;

(dd) compelling prostitution;

(ee) obscenity;

(ff) sale, distribution, or display of harmful material to minor:

(gg) sexual performance by a child; (hh) possession of child pornography;

(ii) any of the following offenses as described in Chapter 2l of the Texas Penal Code:

(aa) public lewdness;(bb) indecent exposure;(cc) indecency with a child;

(iii) sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;

(iv) incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code:

(v) criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;

In the case of a misdemeanor conviction, a license will be denied if an applicant has been convicted or released from confinement within the last two years, determined from the later date. For a felony conviction or two misdemeanor convictions within a twenty-four (24) month period, the period is five years determined from the date of conviction or release from confinement, whichever date is later.

Section 4l-l0(5) provides for the revocation of a license to engage in First Amendment activity where a licensee is convicted of any of the offenses set forth above. Section 4l-l0(6) provides for revocation of a license where two convictions of employees of the sexually oriented business of the enumerated criminal offenses occur within a twelve month period in or on the premises of the business.

The District Court invalidated several subsections of the original Section 41-5(a)(10)(b) that set forth offenses that could be the basis for the denial of a license. Specifically, the Listrict Court struck down Subsections 41-5(a)(10)(A)(iii). (vi)-(ix) which listed the offenses of organized criminal activity, kidnapping, robbery, bribery, and controlled substance violations on the basis that the City failed to make any findings that "the offenses enumerated are sufficiently related to the purpose of the Ordinance." Dumas v. City of Dallas, 648 F.Supp. 1061, 1074 (N.D. Tex. 1986). The District Court also struck down the words "under indictment and misdemeanor information' from Subsection 41-5(a)(10) as violative of the First Amendment. Id. at 1074. The remaining portices of Sections 41-5 and 41-10 were upheld with the exception of Subsection 41-5(a)(10)(B)(c) which provided procedures for the granting of a sexually oriented business license after a conviction that vested unbridled discretion in the chief of police. Id.at 1076. On October 12, 1986, the Dallas City Council amended the ordinance to reflect the District Court's ruling.

The remainder of the ordinance was upheld. The District Court determined that the procedures contained within the ordinance for judicial review and appeal of the denial or resocation of a license to engage in First Amendment activity did not violate Freedman v. Maryland, 380 U.S. 51 (1965) and, in fact, comported with due process. The District Court also upheld the zoning provisions that imposed a dispersion requirement that sexually oriented businesses be one thousand (1000) feet from one another and which further required that such businesses be at least one thousand (1000) feet from any residential use or district, church, school or park.

Following the District Court's ruling on September 12, 1986, the Dallas City Council enacted Ordinance No. 19377 on October 12, 1986 which removed or amended the provisions invalidated by the District Court. A copy of Ordinance 19377 is reprinted at Appendix H.

Petitioners appealed the District Court's order to the United States Court of Appeals for the Fifth Circuit. During the pendency of the appeal, the City of Dallas rigorously enforced the challenged ordinance against sexually oriented businesses. Numerous such businesses were closed or forced out of business. As noted by the City in a sworn affidavit attached to its Response to Petitioner's Application for Stay and Recall of the Mandate, Dallas police officer Stephen Foster stated that one sexually oriented business license was denied on the basis of a prior obscenity conviction which denial was later reversed on appeal. Officer Foster further testified that two licenses were revoked on the basis of an obscenity conviction. In addition, Foster stated that of 165 applications for licenses, 147 were issued. Thus, eighteen licenses to operate sexually oriented businesses were denied for various reasons during the pendency of the appeal.

On February 12, 1988, the Fifth Circuit affirmed the District Court's opinion. FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298 (5th Cir. 1988). The Fifth Circuit upheld the denial or revocation of a license based upon criminal convictions stating, "the City need only show that conviction and the evil to be regulated bear a substantial relationship." Id., 837 F.2d 1298, 1305. The Fifth Circuit determined the ordinance was "well tailored sufficiently to achieve its ends" by providing for the denial or revocation of a license to engage in protected First Amendment activity for criminal convictions. Id. Judge Thornberry dissented from this holding, stating that the right to engage in free speech should not be denied based upon a person's criminal history. 837 F.2d at 1311-1312.

The Fifth Circuit also determined that the procedural safeguards required by Freedman v. Maryland, 380 U.S. 51 (1965) were not required for the licensing ordinance under the time, place and manner analysis set forth in City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986). The Fifth Circuit further stated that the Freedman procedures were also not required because sexually explicit films and publications were entitled to a lesser degree of First Amendment protection and that Freedman procedures were less 'mportant "when a regulation restricts the conduct of an ongoing commercial business." Id., 837 F.2d at 1302-1303.

Judge Thornberry dissented, asserting that since "the denial of a license to engage in speech is... the classic prior restraint," the *Freedman* procedural safeguards were required. *Id.*, 837 F.2d at 1307-1308. The dissent further noted that the majority's analysis of the ordinance as a time, place and manner regulation was inappropriate because the denial of a license would not leave open any alternative avenues of communication unlike the zoning ordinance upheld in *Renton. Id.*, 837 F.2d at 1309.

The panel upheld all other aspects of the Dallas ordinance including the zoning regulations. Judge Thornberry dissented with regard Section 41-5(a)(6) requiring health, fire and building code approval prior to licensing as well as Section 41-7 permitting warrantless inspections since these provisions singled out sexually oriented businesses for special scrutiny without any justification. Petitioners timely filed a Petition for Rehearing En Banc which Petition was denied on March 14, 1988. SeeAppendix B. On March 17, 1988, Petitioners filed a Motion to Stay Issuance of the Mandate Pending Application for Writ of Certiorari to the United Scates Supreme Court pursuant to F.R.A.P. 4l(a). The Fifth Circuit denied this Motion on April 5, 1988. See Appendix C. On April 14, 1988, Petitioners filed an Application for Recall and Stay of Mandate of United States Court of Appeals for the Fifth Circuit.

On April 20, 1988, Justice White, Circuit Justice for the Fifth Circuit, ordered that the judgment and mandate of the United States Court of Appeals for the Fifth Circuit be stayed pending further order by the Circuit Justice or the full Court. See Appendix D. On May 4, 1988, the Supreme Court entered an order staying the judgment and mandate of the United States Court of Appeals for the Fifth Circuit with the exception of the portion of the judgment affirming the zoning regulations of sexually oriented businesses. See Appendix E.

#### REASONS FOR GRANTING THE WRIT

- I. THE FIFTH CIRCUIT'S DECISION UPHOLDING DALLAS SEXUALLY ORIENTED BUSINESS LICENSE ORDINANCE PROVISIONS CONCERNING THE DENIAL OR REVOCATION OF A LICENSE TO ENGAGE IN FIRST AMENDMENT ACTIVITY IS CONTRARY TO THE APPLICABLE DECISIONS OF THIS COURT AND IN CONFLICT WITH NUMEROUS OTHER FEDERAL APPELLATE DECISIONS
  - A. Dallas Municipal Code Sections 41-5(A)(10) And 41-10(B)(5) and (6) Impose an Impermissible Prior Restraint Upon Protected Expression By Providing For The Denial Or Revocation Of A Sexually Oriented Business License On The Basis Of Prior Criminal Convictions Contrary to Vance v. Universal Amusement Co. 445 U.S. 308 (1980)

As previously noted, Dallas Municipal Code Section 41-5(A)(10) provides that issuance of a sexually oriented business license will be denied if "an applicant or an applicant's spouse has been convicted of a crime" listed in the ordinance. Section 41-10(B)(5) provides for the revocation of a license to engage in First Amendment activity where a licensee is convicted of any of the listed offenses. A total of two convictions of the listed offenses by employees of a sexually oriented business within a twelve month period will also support revocation of a license. Section 41-10(B)(6).

The United States Supreme Court in Vance v. Universal Amusement Co., 445 U.S. 308 (1980) held that the application of a public nuisance statute to enjoin the future showing of allegedly obscene motion pictures on the basis of a showing that obscene films had been exhibited in the past, was an unconstitutional prior restraint. The majority opinion stated, "the burden of supporting an injunction

against future expression is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication." Vance v. Universal Amusement Co., Id., at 315-316. See also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-559 (1975); Near v. Minnesota, 283 U.S. 697 (1931).

Justice White, in his *Vance* dissenting opinion, asserted that the Texas injunction procedure at issue there did not constitute a prior restraint:

Prior restraints are distinct from, and more dangerous to free speech than, criminal statutes because, through caprice, mistake, or purpose, the censor may forbid speech which is constitutionally protected, and because the speaker may be punished for disobeying the censor even though his speech was protected. Those dangers are entirely absent here. An injunction against the showing of unnamed obscene motion pictures does not and cannot bar the exhibitor from showing protected material, nor can the exhibitor be punished, through contempt proceedings, for showing such material. Vance, Id., at 324.

The dangers of prior restraints on expression identified by Justice White in his Vance dissent are entirely present under the challenged Dallas licensing scheme. Under any definition, a prior restraint exists in the instant case. The effect of the challenged Dallas sexually oriented business license ordinance is to completely deny the ability of a person or their spouse to engage in an area of protected expression within the entirety of the City of Dallas if that person has been convicted of one the enumerated crimes. As the District Court recognized in its opinion, "denial of a license amounts to an absolute suppression of expression." Dumas v. City of Dallas, 648 F.Supp. 1061, 1074 n. 37. Thus, a misdemeanor conviction for obscenity, display of materials harmful to minors, or other crimes will result in the complete restraint of a person from engaging in protected

conduct<sup>1</sup>. Such a person may be punished for presenting expression without a license even though the expression is protected by the First Amendment. Under either the *Vance* majority or Justice White's dissent, an unconstitutional prior restraint on expression exists in the instant case.

Not only is the decision of the Fifth Circuit in the instant case contrary to this Court's decision in Vance, it is also directly contrary to numerous state and federal appellate court decisions. Three federal appellate circuits have held that a business license cannot be denied or revoked on the basis of prior obscenity convictions. City of Paducah v. Investment Entertainment, Inc., 791 F.2d 463 (6th Cir. 1986) cert. denied, \_U.S. \_\_, 93 L.Ed.2d 290 (1986); Gayety Theatres, Inc. v. City of Miami, 719 F.2d 1550 (11th Cir. 1983); Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497, 506 (7th Cir. 1980) cert. denied, 450 U.S. 919 (1981); Genusa v. City of Peoria, 619 F.2d 1208 (7th Cir. 1980). In addition, as noted in Judge Thornberry's dissent, the decision in the instant case is directly contrary to the Fifth Circuit's own decision in Fernandes v. Limmer, 663 F.2d 619, 636 (5th Cir. 1981) cert, dismissed, 458 U.S. 1124 (1982) which held that a license to solicit funds at an airport could not be denied on the basis of prior criminal convictions. ["Persons with prior criminal records are not First Amendment outcasts."] See also International Soc. for Krishna Consciousness v. Eaves, 60l F.2d 809, 832-833 (5th Cir. 1979)2.

Moreover, this Court recently granted certiorari in a case involving nearly identical issues in Fort Wayne Books, Inc. v. Indiana, 87-470, cert. granted, 56 USLW 3602 (March 7, 1988). There, petitioner challenged the use of state racketeering (RICO) statutes in closing a bookstore selling sexually oriented publications, films, and videotapes and seizing the contents of the bookstore on the basis of alleged

violations of Indiana's obscenity laws. This Court granted review on the issue, *inter alia*, of whether an impermissible prior restraint resulted where a RICO statute authorized the closure of a bookstore on the basis of prior obscenity convictions.

Previously, this Court determined that virtually the same issues justified the notation of probable jurisdiction in State ex rel Kidwell v. U.S. Marketing, Inc., 102 Idaho 451, 631 P.2d 622 (1981) prob. juris noted sub nom U.S. Marketing, Inc. v. Idaho, 454 U.S. 1140 (1981), dism'd p rsuant to stip. 455 U.S. 1009 (1981). Because the case was dismissed pursuant to the stipulation of the parties, the Court never determined the merits of the case. See also Avenue Book Store v. City of Tallmadge, 459 U.S. 997 (1982) (J. White, dissent from denial of cert. joined J. Brennan and Marshall)

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The foregoing authorities conclusively demonstrate that the Fifth Circuit majority opinion in the instant action is directly contrary to the decisions of this Court concerning the prior restraint of future expression on the basis of past conduct. In addition, the panel opinion is in direct conflict with several federal appellate circuits as well as numerous other federal and state court decisions. Moreover, the fact that this Court has previously noted probable jurisdiction in U.S. Marketing and, in this term, has granted certiorari in Fort Wayne Books are clear indications that the substantial First Amendment issues involved in the instant case merit determination by the United States Supreme Court.

B. The Dallas Sexually Oriented Business License Ordinance Inevitably Singles Out Businesses Engaged In First Amendment Activities For The Imposition Of Regulation Contrary to Arcara v. Cloud Books, Inc. 478 U.S. \_\_\_\_, 92 L.Ed.2d 568, 106 S.Ct. 3172 (1986)

The Dallas sexually oriented business license ordinance by its own terms applies only to establishments that sell, display or rent publications, films and videotapes that involve one aspect of protected expression, namely, sexually oriented adult expression. D.M.C. Section 41-2. The challenged ordinance places numerous burdens on businesses engaged in this particular class of First Amendment activities, including licensing, inspection, configuration and prelicensing approval requirements. See D.M.C. Sections 41-4, 5, 7, 19.

The District Court, in its opinion, upheld the provisions of the ordinance authorizing the denial or revocation of a license to present protected expression for prior criminal convictions pursuant to the authority of Arcara v. Cloud Books, Inc., 478 U.S. \_\_, 92 L.Ed.2d 568, 106 S.Ct. 3172 (1986). Dumas v. City of Dallas, 648 F.Supp. 1061, 1073-1074 n. 34 (N.D. Tex. 1986). The Fifth Circuit panel's majority opinion upheld the foregoing provisions without any mention of Arcara. However, Judge Thornberry, in his dissenting opinion, distinguished Arcara.

This Court in Arcara v. Cloud Books, Inc., 478 U.S. \_\_, 92 L.Ed.2d 568, 106 S.Ct. 3172 (1986) upheld the use of a general public nuisance statute to close an adult bookstore used as a place of prostitution as a public nuisance for one year. The Court was careful to note the nuisance statute was of general application that did not "inevitably single out bookstores or others engaged in First Amendment protected activities for the imposition of its burden. . . " Id., 92 L.Ed.2d at 577, 106 S.Ct. at 3177. Moreover, the Court distinguished the closure as a public nuisance from an "unconstitutional prior restraint under Near v. Minnesota, 283 U.S. 697 (1931)," in part, because the bookstore could reopen at other locations. Id., 92 L.Ed.2d at 577 n. 2, 106 S.Ct. at 3177 n. 2. Based upon these facts, the Court held

that "the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books." *Id.*, 92 L.Ed.2d at 578.

Justice O'Connor, in a concurring opinion joined by Justice Stevens, was careful to note that analysis under the First Amendment would be appropriate in other situations:

If, however, a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review. *Id.*, 92 L.Ed.2d at 579 (J. O'Connor concurring, joined by J. Stevens).

Quoted in People v. Sequoia Books, Inc., 518 NE2d 775, 779 (Ill.App. 2 Dist. 1988).

The challenged Dallas ordinance inevitably singles out sexually oriented businesses engaged in protected First Amendment activity for the imposition of the ordinance's numerous requirements. As discussed, *supra*, denial or revocation of a license to operate a sexually oriented bookstore or theater will result in the absolute suppression of the ability to engage in that protected First Amendment activity within the City of Dallas. Moving to a new location is *not* an available alternative avenue of communication as in *Arcara*.

The Fifth Circuit decision in the instant case is also in direct conflict with the decision in *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980) which invalidated several regulations directed solely at adult bookstores. *See FW/PBS*, *Inc. v. City of Dallas*, 837 F.2d 1298, 1310-1311 (J. Thornberry dissenting). In *Genusa*, the Seventh Circuit struck down a requirement for the warrantless safety inspections of adult bookstores since "there is nothing in

the record to indicate that adult bookstores, as a class, contain more faulty light switches or other violations than regular bookstores, as a class." Genusa v. City of Peoria, 619 F.2d 1203, 1214. In the instant case, similar provisions in Sections 41-5(a)(6) and 41-7 of the Ordinance were upheld over Judge Thornberry's dissent. FW/PBS, Inc. v. City of Dallas, supra, at 1310-1311. Moreover, numerous other regulations contained in the Ordinance expressly single out the content of the expression for onerous limitation. See e.g. Section 41-19, entitled "Regulations Pertaining to Exhibition of Sexually Explicit Films or Videos" which mandates the configuration of theaters exhibiting such films.

Because the Fifth Circuit's opinion is contrary to the principles set forth by this Court in Arcara v. Cloud Books, Inc., supra, and is in conflict with the Seventh Circuit's decision in Genusa v. City of Peoria, the Petition for Certiorari should be granted by this Court.

C. The Dallas Sexually Oriented Business License Ordinance Fails To Provide The Procedural Safeguards Necessary To Protect First Amendment Rights Contrary To Freedman v. Maryland, 380 U.S. 51 (1965), National Socialist Party v. Village Of Skokie, 432 U.S. 43 (1977), and Vance v. Universal Amusement Co., 445 U.S. 308 (1980)

This Court has repeatedly stated that "[a]ny system of prior restraints on expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) quoted with emphasis added by Court in Vance v. Universal Amusement, 445 U.S. 308, 317 (1980). "The settled rule is that a system of prior restraint avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 quoting Freedman v. Maryland, 380 U.S. 51 (1965).

In Freedman, this Court held that a system of prior restraint runs afoul of the First Amendment if it lacks any of three safeguards:

First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and for purpose of preserving the status quo. Third, a prompt final judicial determination must be assured. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) (Emphasis supplied).

Section 41-ll of the challenged ordinance sets forth the procedures in the event a license is denied, suspended or revoked. The procedure utilized herein violates the *Freedman* requirements in three ways. First, it places the burden on the licensee to seek review and to go forward with proving the invalidity of the challenged ruling. Second, no provision is present for a prompt determination of the appeal. Third, no provision is present that assures a prompt, final judicial determination. See National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977).

While Section 41-II creates a mechanism for an administrative appeal to a permit and license appeal board, the ordinance does not require: (I) The chief of police to institute prompt judicial proceedings in which he bears the burden of justifying his refusal to issue the requested license; (2) assurance that any interim restraint imposed pending judicial resolution on the merits will be of brief duration; and (3) a guarantee of swift final judicial action. The lack of these procedures results in the "absolute suppression of expression" through the denial or revocation of a sexually oriented business license without any of the procedural safeguards required by Freedman.

The Fifth Circuit decision in the instant case is in direct conflict with numerous federal appellate decisions, including Fifth Circuit decisions, as well as the aforementioned decisions of this Court. Three circuits have made clear that Freedman procedural safeguards are applicable to the denial of a license to operate an adult or sexual oriented business. City of Paducah v. Investment Entertainment, Inc., 791 F.2d 463 (6th Cir. 1986) cert. denied, \_U.S. \_\_, 93 L.Ed.2d 290 (1986); Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), cert. denied 480 U.S. 919 (1981); 754 Orange Ave., Inc. v. City of West Haven, 761 F.2d 105, 114 (2d Cir. 1985) (dictum)3. Several other federal circuits have held that the denial or revocation of a business license regulating First Amendment activities requires Freedman procedural safeguards to be constitutional. Central Florida Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1526 (11th Cir. 1985) (adopting concurring opinion analysis); Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d 666, 675-676 (11th Cir. 1984) cert. denied, \_U.S. \_\_, 106 S.Ct. 1637 (1985); Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981) cert. dismissed, 458 U.S. 1124 (1982); ISKON v. Rochford, 585 F.2d 263 (7th Cir. 1978)4.

In addition, as noted supra, this Court recently granted certiorari in Fort Wayne Books, Inc. v. State of Indiana, Case 87-470, \_U.S. \_\_, 56 U.S.L.W. 3602 (March 7, 1988) which involves several issues relating to the procedural safeguards required when a prior restraint is imposed by the closure of a bookstore under a racketeering statute. The issue presented in the instant case is, thus, identical since this Court's requirement of Freedman procedural safeguards applies to any prior restraint, regardless of whether the prior restraint is imposed through the means of padlocking pursuant to a racketeering statute, the denial of a license to carry on business, or the injunction procedure rejected in Vance.

Since this Court has previously recognized that these issues justify review in Fort Wayne Books, the Petition for Certiorari should be granted. Moreover, the Fifth Circuit decision in the instant case is directly contrary to both the decisions of this Court and numerous federal appellate circuits on the issue of the procedural safeguards required where a prior restraint exists due to the denial or revocation of a license to engage in First Amendment activity. As such, the petition should be granted by this Court.

II. THE DALLAS SEXUALLY ORIENTED BUSINESS LICENSE ORDINANCE PROVISIONS REGULATING ZONING UNCONSTITUTIONALLY RESTRICT THE AVAILABILITY OF PROTECTED SPEECH MATERIALS BY FORCING ALREADY EXISTING BUSINESSES TO CLOSE AND PROVIDING INADEQUATE ALTERNATIVE SITES FOR RELOCATION

D.M.C. Section 41-13 regulates the location of sexually oriented businesses by requiring the dispersion of such businesses at least one thousand (1,000) feet from each other as well as requiring the separation of sexually oriented businesses one thousand feet (1,000) from residential uses, residential districts, churches, schools, and parks. Sexually oriented businesses existing prior to the enactment of the challenged ordinance are given three years (until June 1989) in which to comply with these location restrictions. Section 41-13(f). The major defect in the Dallas zoning scheme is that it forces pre-existing businesses to close and does not provide sufficient locations in which all such businesses can relocate.

As conceded by the City in their Response to Petitioners' Application for Stay of Mandate, the amortization of nonconforming establishments disseminating protected First Amendment materials under a zoning law has never been ruled upon by the United States Supreme Court. In the landmark case on adult zoning, Young v. American Mini Theatres, 427 U.S. 50, 72-73, (plurality opinion of J. Stevens joined by Burger C.J., White, and Rehnquist, J.) and 427 U.S. 50, 84 (Powell J., concurring in result) the Court held that a Detroit zoning ordinance requiring adult movie theaters to be over 1,000 feet from other such theaters was a reasonable time, place and manner restriction of protected speech. The plain language of the challenged Ordinance is similar to the ordinance upheld in American Mini Theatres. However, the application of the Ordinance to Petitioners is far different since the City of Dallas seeks to close businesses existing at the time of the enactment of the Ordinance. The zoning ordinance in American Mini Theatres applied prospectively only and prescribed where adult theatres could be opened. The ordinance did not force existing adult theaters to close.

If the ordinance challenged in *American Mini Theatres* had affected the operation of existing theaters, the Court indicated that the situation would have been different:

The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that [t]he Ordinances do not affect the operation of existing establishments but only the location of new ones. There are myriad locations in the City of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight.' 427 U.S. 50, 71-72 n. 35 (plurality opinion).

As pointed out by the Ninth Circuit recently in Walnut Properties, Inc. v. City of Whittier, 808 F.2d 1331, 1336 (9th Cir. 1987), "there is little doubt that a majority would have questioned an ordinance putting existing theaters out of business."

The Supreme Court's decision in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) does not alter the teachings of American Mini Theatres. No existing theatres were closed under the Renton ordinance. The Court noted, "As Justice Powell observed in American Mini Theatres, '[i]f [the city] had been concerned with restricting the message purveyed by adult theatres, it would have tried to close them or restrict their number rather than circumscribe their location." Renton, 475 U.S. at 48.

Several courts before and after *Renton* have found that ordinances requiring the relocation or closure of existing adult businesses present constitutional problems. *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331 (9th Cir. 1987); *Alexander v. City of Minneapolis*, 698 F.2d 936 (8th Cir. 1983) (Ordinance requiring thirty adult uses to close and relocate at twelve available locations unconstitutional); *People Tags, Inc. v. Jackson County Legislature*, 636 F.Supp. 1345 (W.D. Mo. 1986); *Purple Onion, Inc. v. Jackson*, 51l F.Supp. 1207, 1224 (N.D. Ga. 1981); *County of Cook v. Renaissance Arcade and Bookstore*, 50l NE2d 133 (III.App. 1 Dist. 1986). As noted in *Adultworld Bookstore v. City of Fresno*, 758 F.2d 1348, 1351 (9th Cir. 1985):

There are apparently no appellate cases since Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 3l0 (1976), which have upheld the constitutionality of an ordinance which requires the relocation of existing adult-type businesses. 758 F.2d 1348, 1351.

Unlike Renton and American Mini Theatres, the Dallas ordinance does apply to existing businesses. While Section 41-13 might well be permissible if only applied to new businesses, the termination of non-conforming uses provided for in Section 41-13(f) makes it an impermissible restriction on activities protected by the First Amendment. According to the sworn testimony of Patrick Stewart, Petitioners' Exhibit 5, between 106 to 114 of Dallas' 120 adult entertainment establishments operating at the time of the enactment of the ordinance will have to move under Section 41-13(f). There are simply not enough locations to accommodate those businesses, much less any new businesses which might want to operate.

A comparison of the City's map with a list of all adult entertainment establishments operating in Dallas at the time of the enactment of the ordinance reveals that of those 120 businesses, at least 106 have been made nonconforming uses by Section 41-13. These will have to either relocate within three years or terminate their businesses. There are, for all practical and realistic purposes, no more than 50 locations to accommodate all of the pre-existing businesses forced to move, as well as any new businesses that would seek a location in the next three years.

In contrast, the zoning ordinance upheld in *Renton* only required a concentration of adult uses within an area of 520 acres in a small community of 32,200 (in 1981). *Renton*, 475 U.S. at 44, 52. As noted in Renton's Jurisdictional Statement, p. 18, and before the Supreme Court on oral argument, transcript of argument at 5-6, locations existed for over 400 adult theaters in Renton. While a "reasonable opportunity to open and operate" an adult business existed in *Renton*, no such reasonable opportunity exists under the Dallas ordinance since over 100 sexually oriented businesses are forced to close and relocate into areas that provide approximately fifty locations. All of these new

locations are subject to the dispersion requirements of the ordinance that is designed "to eliminate concentrations" of such businesses, unlike *Renton. See Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1337 (9th Cir. 1987).

Thus, based upon the fact that the Dallas ordinance fails to provide a reasonable opportunity to open and operate sexually oriented businesses existing at the time of the enactment of the ordinance as required by *Young* and *Renton*, substantial questions exist that justify review by this Court. Moreover, the Fifth Circuit decision is contrary to the principles of *Young* and *Renton*, and, further, in conflict with several other federal and state courts.

#### CONCLUSION

Based upon the foregoing arguments and authorities, the Fifth Circuit's decision in the instant case upholding the Dallas licensing ordinance presents grave dangers to free expression that are nearly identical to those presented to this Court in Fort Wayne Books, Inc. v. State of Indiana, \_\_U.S. \_\_, cert. granted 56 USLW 3602 (March 7, 1938) and that require review by this Court in order to maintain this cherished constitutional guarantee.

Dated: June 6, 1988.

Respectfully submitted,

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#### **FOOTNOTES**

- 1 The constitutionality of statutes creating the crime of display of material harmful to minors had not yet been conclusively determined. This Court recently certified two questions to the Virginia Supreme Court in Virginia v. American Booksellers, Inc., \_ 98 L.Ed.2d 782 (1988), regarding the constitutionality of a statute making it a crime to display materials "harmful to juveniles." Several other courts have declared such statutes unconstitutional. American Booksellers Association v. Strobel, 617 F.Supp. 699 (E.D. Va. 1985) aff'd 802 F.2d 691 (4th Cir. 1986) questions certified to \_U.S. \_\_ \_\_ 98 L.Ed.2d 782 (1988); American Booksellers Association v. McAuliffe, 533 F.Supp. 50 (N.D. Ga., 1981); Tattered Cover, Inc. v. Tooley, 696 P.2d 780 (Colo. 1985); American Booksellers Ass'n, Inc. v. Superior Court, 129 Cal.App. 3d 197, 181 Cal. Rptr. 33 (1982) but see Upper Midwest Booksellers Ass'n v. Minneapolis, 780 F.2d 1389 (8th Cir. 1985); M.S. News Co. v. Casado. 721 F.2d 1281 (10th Cir. 1983).
- 2 Numerous other state appellate courts and federal district courts have held that business licenses regulating First Amendment activities cannot be denied or revoked on the basis of previous obscenity or other criminal convictions. See Holy Spirit Ass'n v. Hodge, 582 F.Supp. 592 (N.D. Tex. 1984); Cornflower Entertainment, Inc. v. Salt Lake City Corp., 485 F.Supp. 777 (D. Utah. 1980); Yuclan Enterprises, Inc. v. Arre, 488 F.Supp. 820 (D. Hawaii 1980); Bayside Enterprises, Inc. v. Carson, 470 F.Supp. 1140 (M.D. Fla. 1979); San Juan Liquors v. Consol. City of Jacksonville, 480 F.Supp. 151 (M.D.Fla. 1979); Natco Theatres, Inc. v. Ratner, 463 F.Supp. 1124 (S.D.N.Y. 1979); Avon 42nd Street Corp. v. Myerson, 352 F.Supp. 994 (S.D.N.Y. 1972); Oregon Bookmark Corp. v. Schrunk, 321 F.Supp. (D. Oregon 1970); Perrine v. Municipal Court, 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648 (1971), cert. den. 404 U.S. 1038 (1972); Kuhns v. Santa Cruz Co.Bd. of Sup'rs, 128 Cal.App.3d 369, 374-375, 181 Cal.Rptr. 1, 3-4 (1982); City of Delevan v. Thomas, 31 Ill.App. 3d 630, 334 NE2d 190 (1975); Alexander v. City of St. Paul, 303 Minn. 201, 227 NW2d 370 (Minn. 1975); Hamar Theatres, Inc. v. City of Newark, 150 N.J.Super. 14, 374 A.2d 502 (1977); Colonie Theater v. City of Schenectady, 89 A.D.2d 631, 453 N.Y.S. 2d 94 (1982); People v. J.W. Productions, 413 N.Y.S. 2d 552 (N.Y.C.Cr.Ct. 1979); City of Seattle v. Bittner, 81 Wash.2d 747, 505 P.2d 126 (1973) Cf. Southland News Co., Inc. v. People, 143 Ill.App. 3d 97, 493 NE2d 398 (Ill.App. 1986).
- 3 See also Wendling v. City of Duluth, 495 F.Supp. 1380 (D. Minn. 1980); Cf. Southland News, Inc. v. People, 143 Ill.App. 3d 371, 473 NE2d 398 (1986).
- 4 See also National Federation of the Blind v. Riley, 635 F.Supp. 256 (E.D. N.C. 1986); Holy Spirit Assn v. Hodge, 582 F.Supp. 592 (N.D. Tex. 1984); ISKON, Inc. v. Schmidt, 523 F.Supp. 1303 (D. Md. 1981).

## APPENDIX

87-2012

IN THE SUPREME COURT OF THE UNITED STATES COURT, U.S. October Term, 1987

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FILED

JOSEPH F. SPANIOL, JR.

FW/PBS, INC., a Texas Corporation, d/b/a PARIS ADUCERK BOOKSTORE II; FW/PBS, INC., a Texas Corporation, d/b/a PARIS ADULT VIDEO CENTER; FW/PBS, INC., a Texas Corporation, d/b/a FILMWORLD; DSB, INC., a Texas Corporation, d/ b/a DENMARK BOOKSTORE; CHARLES E. CARLOCK, d/b/a PARIS ADULT BOOKSTORE I; LONE STAR MULTI THE-ATRES, INC., a Texas Corporation, d/b/a NEW FINE ARTS ADULT THEATRE; LONE STAR MULTI THEATRES, INC.: a Texas Corporation, d/b/a LA CAGE; BEVERLY K. VAN DUSEN d/b/a LONE STAR BOOKSTORE; BEVERLY K. VAN DUSEN, d/ b/a ELITE BOOKSTORE; BILL STATEN, JR., d/b/a ROYAL LANE BOOKSTORE; BILL STATEN, JR., d/b/a NEW VEN-TURE VIDEO: BILL STATEN, JR., d/b/a MOCKINGBIRD LANE NEWS; Bi-Ti ENTERPRISES, INC., d/b/a RED LETTER NEWS; GATTIE CORPORATION, d/b/a FANTASYLAND; GAT-TIE CORPORATION, d/b/a VIDEOLAND ARCADE: GATTIE CORPORATION, d/b/a VIDEOSTOP: J.R.E. ENTERPRISES, d/ b/a KAZBAH BOOKSTORE; ENTERTAINMENT UNLIMITED. d/b/a EROS DALLAS.

VS.

THE CITY OF DALLAS, a Texas Incorporated Municipality: A. STARKE TAYLOR, Mayor of the City of Dallas in his representative capacity only; BILLY PRINCE, Chief of Police of the City of Dallas, in his representative capacity only.

#### APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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#### APPENDIX A

### IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86-1723

FW/PBS, INC., ETC., ET AL.,

Plaintiffs-Appellants

versus

THE CITY OF DALLAS, ETC., ET AL.,

Defendants-Appellees.

JOHN RANDALL DUMAS d/b/a/ GENO'S,

Plaintiff,

TEMPO TAMERS, INC., ETC., ET AL.,

Plaintiff-Appellants,

versus

CITY OF DALLAS, ETC.,

Defendant-Appellee.

CALVIN BERRY, III, ET AL.,

Plaintiff-Appellants,

versus

CITY OF DALLAS, ETC., ET AL.,

Defendants-Appellees.

#### Appeals from the United States District Court for the Northern District of Texas

(February 12, 1988)

Before THORNBERRY, GARWOOD and HIGGIN-BOTHAM, Circuit Judges.
HIGGINBOTHAM, Circuit Judge:

In the early summer of 1986, the City of Dallas, Texas began to consider the regulation of the effects of sexually oriented businesses upon the community. After study of similar efforts by other metro, olitan cities, the City Council passed a detailed ordinance that imposed licensing and zoning restrictions upon sexually oriented businesses. A variety of businesses that would be subject to its regulations attacked the Ordinance in three separate federal suits. Each of the three suits asked the district court to enjoin enforcement of the Ordinance and declare it unconstitutional. The suits were consolidated and the case was submitted for decision on motions for summary judgment filed by all parties. The district court, with exceptions not complained of here, upheld the Ordinance in a detailed written opinion.<sup>1</sup>

These plaintiffs appeal urging that the district court erred in two main regards. First, plaintiffs allege that the licensing provisions are content-based regulations, a prior restraint upon activity protected by the first amendment, and invalid because they lack the required procedural protections for such regulation. Second, plaintiffs complain that the court was wrong to conclude that reasonable alternative locations are available for existing businesses forced to move by the Ordinance, an inadequacy that denied their rights under the first and fourteenth amendments.

Plaintiffs also make more specific attacks to the Ordinance. They urge that the licensing scheme is unconstitutional because it fails to limit the discretion of the Chief of Police, the licensing official, and because it disqualifies persons based on their criminal record.

We are not persuaded that the district court erred in its rejection of the constitutional attack and affirm. Other and more narrow attacks upon specific provisions of this ordinance were also made. We will explain these contentions and our reasons for affirming their rejection in due course.

I

The Ordinance subjects sexually oriented businesses to zoning and licensing requirements. A business must be at least 1000 feet from another sexually oriented business or a church, school, residential area, or park. Such businesses must also obtain a license issued by the Chief of Police and permit inspection of their premises when open or occupied. A license is not available to persons formerly convicted of specified crimes, such as promotion of prostitution. The ordinance also requires that viewing rooms in adult theatres be configured to allow visual surveillance by management.

The ordinance recites that its purpose is to promote health, safety and morals and to prevent the "continued concentration of sexually oriented businesses." It disclaims any purpose to deny "access by adults to sexually oriented materials protected by the First Amendment."

The city attorney first presented the Ordinance to the Dallas City Plan Commission. The Plan Commission heard testimony from supporters as well as opponents of the Ordinance. The Commission considered studies of other cities regarding the relationship among concentrations of sexually oriented business, crime and property values, but did not conduct studies of Dallas itself. The Plan Commission did, however, consider a study of alternative locations within Dallas for the affected businesses. On the basis of its findings, the Plan affected businesses. On the basis of its findings, the Plan Commission unanimously recommended that the City Council adopt the Ordinance.

The Council unanimously adopted the Ordinance after making a number of findings. It considered the same studies as well as a number of findings. It considered the same studies as well as a study conducted by the Dallas Police Department that concluded that crime rates are 90% higher in adult districts. The Council concluded that public health and safety required regulations of these businesses because they "are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature"; that there have been a substantial number of arrests for sex-related crimes near these businesses; and that the evidence that these businesses are associated with "urban blight" and declining property values is well documented.

#### H

We first examine the district court's exercise of jurisdiction and the standing of the plantiffs. Seven of the nine types of sexually oriented businesses regulated by the Ordinance are represented by at least one plaintiff. These plaintiffs include adult arcades, adult bookstores, adult video stores, adult cabarets, adult motels, adult motion picture theaters, and nude model studios. Only escort agencies and sexual encounter centers are not before the court and we do not decide the constitutionality of the Ordinance as it applies to them. Nor do we decide whether

the Ordinance may constitutionally reach businesses that sell sexually-oriented reading materials or videos solely for use off the business' premises. Each of the book and video stores before us also offered on-premises consumption of sexually oriented materials.

There is no question but that this is a genuine and not a hypothetical controversy. The plaintiffs are subject to the terms of the Ordinance and obedience to its terms will limit business in ways that will result in economic loss as well as a loss of freedom to engage in acts that enjoy some measure of protection under the first amendment.

We also are not persuaded that there is a basis for abstention. There were no pending state proceedings, none have been instituted and we are not pointed to any possible construction of the Ordinance by state courts that might make imprudent our exercise of jurisdiction.

#### ш

Plaintiffs contend that the licensing scheme must fail for several related reasons. First, they argue that insisting on a license for sexually oriented businesses regulates the content of expression protected by the first amendment without the procedural protections of Freedman v. Maryland,<sup>2</sup> and Fernandes v. Limmer.<sup>3</sup> The ordinance is said to suffer three procedural deficiencies: it places the burden of proof upon the licensee to prove that a license was wrongfully denied; it fails to provide for prompt determination of the appeal; and it fails to provide assurance of a "prompt final judicial determination."

We are not persuaded that this ordinance requires such procedural safeguards for its validity. The argument assumes that the Ordinance licensing scheme regulates protected activity in a way that triggers the procedural requirements of Freedman. The ultimate issue in Freedman was the constitutionality of Maryland's motion picture statute. Maryland made it unlawful to distribute or exhibit films unapproved by a Board of Censors. Maryland did not provide for judicial participation or otherwise assure prompt review in its procedure although its board could bar the showing of a film. The court held that this prior restraint can avoid constitutional infirmity only if hedged by procedural safeguards designed to obviate the dangers of a censorship system. The court concluded that these safeguards include the state's shouldering of the burden of persuasion, a "procedure requiring a judicial determination...," and restriction of prior restraint to the shortest fixed period compatible with sound judicial resolution.4

We applied Freedman in Fernandes to strike down a regulation of the Dallas-Fort Worth Airport Authority denying followers of the Krishna religion a license to solicit at the airport. We rejected the suggestion that the regulation was sufficiently content-neutral to escape the procedural requirements of Freedman: "Although D/FW's regulatory ordinance purports to be content-neutral, the consequences flowing from a permit denial here are essentially the same as those addressed in Freedman: to an unsuccessful permit applicant, the unavoidable delay posed by judical review is tantamount to an effective denial of First Amendment rights."

A license from the airport authority was necessary in order to solicit for religious purposes in a public forum. There was no finding that the restraint of protected first amendment activity was narrowly tailored to the regulation of any untoward consequences and no findings that the protected conduct had consequences regulable by the state

under its police power. Stated more directly, the airport authority was seen as controlling a religious group's access to a public forum without justification. We concluded that *Freedman's* protection were required but absent.

In Fernandes we did not apply the time, place and manner analysis of "Young v. American Mini Theatres, Inc.6" There the Supreme Court faced a zoning scheme similar to the Dallas Ordinance. It prohibited locating an adult theatre within 1,000 feet of any two other 'regulated uses' or within 500 feet of any residential zone. Although a majority of the Justices voted to uphold the regulation, five could not agree on a single rationale.

Four years after our decision in Fernandes, however, a majority of the Supreme Court settled on a time, place and manner rationale for zoning an activity that is sexually oriented but not obscene. In City of Renton v. Playtime Theatres, Inc., 7 the Court reviewed a zoning ordinance enacted by Renton, Washington that prohibited adult motion picture theatres from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or school. 8 Characterizing the City of Renton ordinance as a time, place or manner restriction, the Court found the first amendment satisfied because the city had a substantial interest in regulating sexually oriented businesses and did so without restricting alternative avenues of communication. 9

We applied City of Renton to a licensing scheme substantially similiar to the Dallas Ordinance in SDJ, Inc. v. City of Houston. On the basis of City of Renton, we upheld the Houston ordinance against a facial first amendment challenge. The opponents of the Ordinance, however, made no attack to the procedural protections in the Ordinance. Nevertheless, the City of Renton and City of Houston decisions

guide our analysis of the procedural protections the City of Dallas must provide here.

Most important, these decisions recognize that a city may regulate the effects of sexually oriented businesses without engaging in content-based regulation. The City of Renton Court found no reason to apply rigorous content-based analysis where a city's "predominant concern" is to control the negative effects of a certain kind of business rather than to suppress a certain type of speech. In addition, the court held that sexually explicit materials deserve less first amendment protection than other kinds of speech. In short, to the extent that Fernandez [sic] reaches Dallas' present zoning regulation, it is limited by the City of Renton decision; the first amendment protection required for religious activity, including proselytizing and solicitation of money, is of a different order than the protection due sexually oriented businesses.

We find that the Dallas Ordinance, like the Ordinance before the court in *Renton*, regulates only the secondary effects of sexually oriented businesses. For this reason, the Ordinance need only meet the standards applicable to time, place, and manner restrictions and need not comply with *Freeman's* [sic] more stringent limits on regulations aimed at content.

This is not to say that the lower level of protection provided in City of Renton inevitably excludes the procedures required by Fernandez [sic]. In this case, however those procedures were not necessary insofar as the Dallas Ordinance regulates a business engaged in an activity subject only to the lesser protection. Fernandez [sic] procedures are less important when a regulation restricts the conduct of an ongoing commercial enterprise. What is being limited here is not a particular movie—as in Freeman

[sic]—nor episodic solicitation efforts—as in Fernandez [sic]—but a long-term commercial business. The ongoing nature of the regulation provides a strong incentive for the business operators to seek review of licensing decisions, even if that review is not given immediately.<sup>13</sup> We do not decide today whether Fernandez procedures apply to lesser-protected activities conducted outside the realm of an ongoing commercial enterprise.

We are also satisfied that the Ordinance is valid on its face. Because the Ordinance in City of Renton was a content-neutral time, place or manner restriction, the Supreme Court required only that it be "designed to serve a substantial government interest" and allow for "reasonable alternative avenues of communication." The Dallas Ordinance meets both those requirements. Like the City of Renton ordinance, the Dallas law was designed to serve the City's interest in maintaining "the quality of urban life." The City Council's consideration of the criminal effects of concentrated sexually-oriented businesses was thorough, as was its review of the effects such concentrations have on property values. In short, Dallas has demonstrated that the Ordinance furthers a substantial government interest.

The Ordinance also allows reasonable alternative avenues of communication. In Basiardanes v. City of Galveston, 16 we held that an ordinance restricting adult theatres to locations that were "poorly lit, barren of structures suitable for showing films. and perhaps unsafe," did not provide adequate alternative locations. Here, however, the city offered evidence that convinced the district court that the alternative sites are feasible locations and not just open areas on a city map. Putting aside the question of the deference the district court owed the findings of the city

council regarding alternative locations, it had evidence before it sufficient to sustain its findings. Plaintiffs suggest that such findings are inappropriate for deciding a motion for summary judgment. Perhaps that is so, and we express no opinion in this regard. However, the parties submitted the case for decision on the record and the record supports the district court's findings regarding the number of alternative locations.

#### IV

We also are not convinced by the other constitutional attacks against the Ordinance's licensing provisions. Appellants rely on several different constitutional provisions in their challenge: they attack three specific license requirements as prior restraints under the first amendment, they contend that the Ordinance's grant of discretion to the police chief violated the first amendment's prohibition on vagueness, and they argue that the Ordinance's inspection-consent provision violates the fourth amendment's limitations on searches as well as the first amendment. We deal with these attacks in turn.

#### A

As a threshold matter, we note that the City of Renton standard of review applies to the details of the licensing scheme—as operations and the zoning rules—even though the licensing scheme may regulate aspects of the businesses' operations other than location. The kind of speech affected by the license requirements and the city's justification for enforcing them are the same for both kinds of restrictions. Whether a license is denied because the business is improperly located or because the business is improperly maintained, the effect is the same—the operator must refrain from the activity and his only alternative is to comply with the Ordinance and obtain a license. 17 Indeed,

as the very title of the doctrine suggests, "time, place or manner" analysis cannot be limited solely to regulation of "place."

On this basis we hold, in accordance with the prevailing view, that the first amendment does not prohibit the City of Dallas from requiring that viewing booths in adult theatres be open '8 Although this requirement is based on slightly different considerations than those that support the zoning requirements, the public purpose involved is no less substantial. The City could reasonably conclude that closed booths encourage illegal and unsanitary sexual activity in adult theatres. The substantial government interest in curbing such effects supports the open booth requirement as a valid restriction under City of Renton standards.

The owners of adult motels make a separate challenge to the Ordinance provision prohibiting rental of a motel room for less than ten hours at a time. The motel owners allege that the City made no finding that adult motels engender the same effects on property values and crime as do other sexually oriented businesses. Once again, however, we find the City's interest to be self-evident and substantial. It is certainly within reason that short rental periods facilitate prostitution, one of the criminal effects with which the City Council was most concerned.

Appellants also attack the Ordinance provision that denies licenses to persons convicted of certain crimes. 19 Arguably, it is awkward to analyze this occupational disability as a time, place or manner restriction within the City of Renton framework. This part of the Ordinance does not simply regulate the manner of protected activity, it denies the right of persons convicted of certain crimes to engage in the regulated businesses.

Proceeding in categorical terms sheds little light on the standard of review we should apply, although we can imagine three possibilities. First, we might subject the provision to the strict level of review reserved for content-based regulation, and require the city to show that the provision is precisely drawn to serve a compelling interest. Second, we might apply City of Renton's approach and require that the provision serve a substantial government interest while leaving open alternative avenues of communication. Finally, although the provision might not be considered content neutral, the fact that it impinges on a lesser-protected category of speech might justify the application of some intermediate standard of review, particularly when the regulation is a form of disability commonly attending convictions.

A strong argument can be made that we need not determine which standard of review is most appropriate because the provision can in any event withstand strict scrutiny; that the city's findings demonstrate a compelling interest in limiting the involvement of convicted persons in the operation of sexually oriented businesses; that by documenting the strong relationship between sexually-oriented businesses and sexually related crimes, the city established a compelling justification for barring those prone to such crimes from the management of these businesses. The argument would continue that the city's findings conform with the well-accepted notion that the government may attach to criminal convictions disabilities aimed at preventing recidivism.<sup>21</sup>

While compelling necessity might be a proper standard to measure regulation disabling a person with full participatory rights of citizenship, on balance we are persuaded that only a substantial relationship need be shown between the conviction and the evil sought to be prevented. The courts have not engaged in such strict scrutiny or otherwise required compelling necessity to justify other occupational bars attending a criminal conviction, includ-

ing those laced with activity protected by the first amendment such as labor organizing. In short, the City need only show that conviction and the evil to be regulated bear a substantial relationship.

We agree with the district court that the Ordinance is now sufficiently well tailored to achieve its ends. Ineligibility results only from offenses that are related to the kinds of criminal activity associated with sexually oriented businesses. <sup>22</sup> In addition, the Ordinance permits licensing of former offenders after enough time has passed to indicate they are no longer criminally inclined, and takes into account the seriousness of applicant's offenses. <sup>23</sup> The relationship between the offense and the evil to be regulated is direct and substantial.

This result also is consistent with our decision in Fernandez [sic]. The ordinance challenged in Fernandez [sic] denied a permit to anyone convicted of an offense involving moral turpitude. Yet, in Fernandez [sic] there was no immediate relationship between crimes of moral turpitude and the purpose of the airport's ordinance.<sup>24</sup>

B

We also agree with the district court that the Ordinance does not give impermissibly broad discretion to the Chief of Police in issuing, suspending, and revoking licenses. Among other things, the Ordinance empowers the Chief of Police to require "reasonably necessary" information in a license application, to deny a license for failure to comply with "applicable (health, fire and building) laws and ordinances," and to revoke a license if the licensee gave "false or misleading information" in the application or has "knowingly" permitted illegal conduct on the premises. 25

As these examples demonstrate, the Ordinance relies on standards that are "susceptible of objective measurement" and thus consistent with the first amendment.<sup>26</sup> The factual basis necessary for each of these determinations is either implicitly obvious, as in what constitutes "false" information or information "reasonably necessary" for an application, or ascertainable through reference to other sources of law, as in what constitutes a violation of health laws or knowledge of illegal conduct.<sup>27</sup>

C

Finally, plaintiffs attack the Ordinance provision permitting the inspection of a licensed business whenever the premises are occupied or open for business. <sup>28</sup> We reject the argument that this provision violates the fourth amendment prohibition against unreasonable searches. Under the administrative search doctrine, searches to enforce regulatory standards may be reasonable in light of the reduced expectation of privacy in a prevasively regulated business. <sup>29</sup>

Communities have long been concerned about the effects of sexually oriented businesses and have attempted to cope with those effects through regulation. Indeed, in light of this history of regulation we rejected a facial fourth amendment attack to an ordinance permitting warrantless searches of licensed massage parlors.<sup>30</sup> We hold that sexually oriented businesses face a degree of regulation that renders the inspection provision presumptively reasonable.

Nor do we find the inspection provisions unduly burdensome under the first amendment. The power of the city to inspect for violations does not enhance the Ordinance's suppressive effect, for the city may revoke a license only for non-compliance with substantive provisions we have determined to be consistent with *City of Renton* standards. Rather, the city has a substantial interest in enforcing the Ordinance and the inspection provision is well tailored to serve that interest.

AFFIRMED.

- 1 See Dumas v. City of Dallas, 648 F. Supp. 1061 (N.D. Tex. 1986).
- 2 380 U.S. 51 (1965).
- 3 663 F.2d 619 (5th Cir. 1981), cert. dismissed, 458 U.S. 1124 (1982).
- 4 Id. at 58-59.
- 5 663 F.2d at 628.
- 6 427 U.S. 50 (1976).
- 7 106 S.Ct. 925 (1986).
- 8 Id. at 925-27.
- 9 Id. at 930-32.
- 10 Slip op. No. 86-2735 (5th Cir. Feb. 10, 1988).
- 11 City of Renton, 106 S.Ct. at 930.
- 12 Id. at 929-30 n.2.
- 13 Cf. Freeman [sic], 380 U.S. at 59 (noting that "[t]he exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation").
- 14 City of Renton, 106 S.Ct. at 930.
- 15 Id. at 930.
- 16 682 F.2d 1203, 1214 (5th Cir. 1982).
- 17 Contrary to Judge Thornberry's dissent, see post at 9, Fernandez [sic] did not hold that a licensing scheme may never be used to implement a valid time, place or manner restriction on speech activity. Rather, Fernandez [sic] held that the delay in judicial review of a license denial itself impermissibly infringed on the applicant's right to speak for the duration of that delay. 663 F.2d at 628. The fact that this delay occurred in the context of licensing was not important to the court's decision. More on point is the pre-Renton decision, Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980). There the court upheld a zoning provision scattering adult businesses pursuant to a finding by the City of Peoria that concentrations of such businesses eroded neighborhoods. Notably, Genusa accepted the proposition that licensing requirements be treated under the same analysis as zoning. See id. at 1212.
- 18 See Wall Distributors, Inc. v. City of Newport News, 782 F.2d 1165, 1169 (4th Cir. 1986); Ellwest Stereo Theatres, Inc. v. Wenner, 681 F.2d 1243, 1246 (9th Cir. 1982).
- 19 These included a variety of prostitution offenses; obscenity; sale, distribution, or display of harmful material to a minor; sexual performance by a child; possession of child pornography; public lewdness; indecent exposure; indecency with a child; sexual assault; aggravated sexual assault; and incest, solicitation of a child, or harboring a runaway child.
- 20 See Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 541 (1980).

- 21 Cf. De Veau v. Braisted, 363 U.S. 144, 158-59 (1960) (plurality opinion) ("Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas."); 106 Forsyth Corp. v. Bishop, 482 F.2d 280, 281 (5th Cir. 1973) (per curiam) (first amendment permits revocation of theatre license for violation of law against sexually explicit screenings), cert. denied, 422 U.S. 1044 (1975).
- 22 The district court scrutinized the list of crimes that would make an applicant ineligible for a license and invalidated those it found to have no relationship to the purpose of the Ordinance. These offenses included kidnapping, robbery, bribery, controlled substances violations, and "organized criminal activities." Dumas, 648 F. Supp. at 1074.
- 23 An individual convicted of a specified misdemeanor becomes eligible for a license two years after the conviction or end of confinement, whichever is later; for felonies or multiple misdemeanors the period is five years.
- 24 See 663 F.2d at 630.
- 25 Although the district court left these provisions standing, the court invalidated two sections of the ordinance as unduly discretionary. One provision denied a license to applicants who have been "unable to operate or manage a sexually oriented business in a peaceful and lawabiding manner." The other permitted issuance of a license to applicants who, although previously convicted of a crime, are "presently fit to operate a sexually oriented business." See Dumas, 648 F. Supp. at 1072-73. The district court struck these parts from the ordinance, so they are not before us.
- 26 See Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967); Kunz v. New York, 340 U.S. 290 (1951).
- 27 See SDJ, Inc. v. City of Houston, supra (upholding similar ordinance provision).
- 28 Judge Thornberry would invalidate the requirement that licensed businesses comply with the city's health, fire and building codes as a restraint of speech unrelated to the city's stated purposes. We do not reach this issue because the Appellants' only stated attack to the code-compliance requirement was that it vested too much discretion in city officials. We have dealt fully with this argument, but we will not consider others not presented to us.
- 29 See United States v. Biswell, 406 U.S. 311, 316 (1972); Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978).
- 30 See Pollard v. Cockrell, 578 F.2d 1002, 1014 (5th Cir. 1978).

THORNBERRY, Circuit Judge, concurring in part and dissenting in part:

As stated by the majority, this case concerns the limits on the manner in which the City of Dallas may restrict the speech of its citizens in its continuing fight against crime and urban blight. Dallas has chosen, as a means of achieving these laudable goals, a system of licensing and zoning of sexually oriented businesses. Because the activities of many of these businesses implicate First Amendment concerns, it is the duty of this court to closely examine these laws. Because I believe the majority has not applied standards consistent with prior case law in its examination of the ordinance, I respectfully dissent from part of the majority opinion.

I dissent only with respect to those businesses whose activities directly implicate the First Amendment, such as the adult book stores, adult video stores, and adult motion picture theaters. Because no showing has been made that these businesses in any way involve obscenity, they are entitled to First Amendment protection. See, e.g., Schad v. Borough of Mount Ephraim, 101 S.Ct. 2176, 2184 n.10 (discussing how Young v. American Mini Theaters, Inc., 96 S.Ct. 2440 (1976) analyzed the impact on the First Amendment of an ordinance zoning adult movie theaters), 2186 (holding that nonobscene nude dancing is protected by the First Amendment) (1981). I therefore concur with the majority insofar as it upholds the ordinance as applied to businesses, such as adult motels, whose primary activities are not speech.

I also concur with the majority's result in upholding the zoning provisions of the ordinance. I do wish to clarify that I understand the time, place, and manner doctrine as applying only to restrictions like the zoning provisions of the Dallas ordinance. The time place, and manner doctrine should not apply to the licensing laws<sup>1</sup> if the denial of a license completely bans the speech of the person denied and does not leave the speaker alternative avenues of communication. See, e.g., Basiardanes v. Galveston, 682 F.2d 1203, 1213 (1982) ("A reasonable time, place, and manner regulation restricts speech but leaves open adequate alternative channels of communication to the speaker.").

I

In Freedman v. Maryland, 85 S.Ct. 734 (1965), the Supreme Court required that the state provide certain procedural safeguards before imposing a prior restraint on speech. First, the state must have the burden of instituting judical proceedings in which it bears the burden of justifying its actions. Second, some system must assure that any interim restraint imposed pending judicial resolution will be of brief duration. Finally, the state must guarantee swift judicial action. *Id.* at 739. In essence, *Freedman* holds that "no forum except a court can be permitted to impose a valid final restraint on expressional activities. ... " L. Tribe, *American Constitutional* Law § 12-34 (1978).

The Dallas ordinance does not provide for a court to review license denials in the manner required by *Freedman*. The ordinance places the burden of appealing on the licensee, gives no assurance that the burden placed on one

denied a license will be of brief duration, and contains no guarantee of swift judical action. The denial of a license to engage in speech is, however, the classic prior restraint.<sup>3</sup> Thus, it seems to me, on its face *Freedman* condemns the ordinance.

The majority apparently concludes, however, that Freedman's procedural safeguards are not needed because the ordinance is content-neutral and because sexually oriented speech deserves only diminished First Amendment protection. The majority attempts to distinguish Judge Williams' opinion in Fernandes v. Limmer, 663 F.2d 619 (5th Cir. Unit A 1981), which applied Freedman to an ordinance regulating the distribution of literature and solicitation of funds at the Dallas-Fort Worth Airport. I believe that Fernandes cannot be distinguished on this issue.

The majority first states that, unlike the ordinance at issue now, the Airport ordinance was not "sufficiently content-neutral." But as the Supreme Court has defined that term, both the Dallas ordinance and the Fernandes ordinance are content-neutral. An ordinance is content-neutral if it can be justified by a purpose unrelated to the suppression of particular speech. See Renton v. Playtime theatres, Inc., 106 S.Ct. 925, 929 (1986) (defining content-neutral speech regulations as those that are justified "without reference to the content of the regulated speech"); Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 96 S.Ct. 1817, 1830 (1976).

The ordinance at issue in this case is content-neutral because, as the majority points out, it can be justified by a

desire to fight crime and urban blight—interests unrelated to the suppression of particular speech. The ordinance in Fernandes, however, was also content-neutral. The purpose of the D/FW ordinance was to prohibit interference with people moving through the airport and to help the flow of pedestrian traffic. See Fernandes, 663 F.2d at 635. Moreover, Fernandes expressly referred to "D/FW's content-neutral permit system." Id. at 627. Thus, the majority's conclusion that Fernandes did not involve a content-neutral regulation is unwarranted.

The majority also attempts to distinguish Fernandes by stating that "Itlhere was no finding that the restraint of protected first amendment activity was narrowly tailored to the regulation of any untoward consequences and no findings that the protected conduct had consequences regulable by the state under its police power." But Fernandes imposes procedural requirements on even narrowly tailored restraints. The Fernandes court found that some of the substantive provisions of the airport ordinance withstood constitutional scrutiny. Id. at 629 (denial of permit for false statements in permit application), 636 (denial of permit for interference with pedestrian traffic). Nevertheless, the court still required that the Airport Board adhere to the procedural safeguards when denying a permit. Id. at 628. The majority has not offered any valid justification for the absence of procedural safeguards in the Dallas ordinance. Most of the justifications offered by the majority only relate to the validity of the substantive restrictions the Dallas ordinance places on First Amendment activity. They are irrelevant to the adequacy of the procedural safeguards attending the substantive restrictions—a central concern of Fernandes. The majority never argues, and probably cannot argue, that the absence of procedural safeguards, in addition to the substantive provisions, is narrowly tailored to any identified state interest.

In discussing the constitutionality of the absence of the *Freedman* safeguards, the majority does make one argument that deserves special attention. According to the majority, the procedural safeguards

are less important when a regulation restricts the conduct of an ongoing commercial enterprise. What is being limited here is not a particular movie—as in Freedman—nor episodic solicitation efforts—as in Fernandes—but a long-term commercial business. The ongoing nature of the regulation provides a strong incentive for the business operators to seek review of licensing decisions, even if that review is not given immediately.

The majority is arguing that the more severe the infringement on a person's First Amendment rights, the less protection that person deserves. Such an argument seems to me to defy common sense. A government cannot avoid the constitutional procedures that safeguard an individual's rights merely by smothering the rights to such an extent that the individual is taunted into fighting back. This dangerous reasoning, which can only serve to encourage governments to impose the strongest possible burden on what they deem to unacceptable speech, contravenes the precepts of the First Amendment.

The majority also attempts to escape Fernandes by arguing that the denial of a license to engage in sexually oriented speech need not be narrowly tailored even if the speech is nonobscene and protected by the First Amendment. The majority argues that this type of speech is entitled to less first amendment protection than other

speech, and that to pass constitutional muster, the restraints on this type of speech need be characterized only as reasonable time, place, and manner regulations. In reaching its conclusion the majority relies on City of Renton v. Playtime Theatres, Inc., 106 S.Ct. 925 (1986). A close reading of *Renton* shows that the language quoted by the majority arises in a different context than that involved in Dallas' licensing scheme.

Unlike the current case, which involves an ordinance containing both a zoning system and a substantive licensing scheme, Renton involved a challenge to a zoning ordinance alone. The Court stated that its first step in addressing the challenge was to describe the ordinance as a content-neutral time, place, and manner regulation. Id. at 928. The Court cited Young v. American Mini Theatres, Inc., 96 S.Ct. 2440 (1976) in finding that "at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral time, place, and manner regulations." 106 S.Ct. at 929-30 (footnote omitted) (emphasis added). The Court described Young as concluding that a state may draw a distinction between adult theaters and other theaters without violating the obligation of content-neutrality toward protected speech. Ad. at 930. As Justice Powell elaborated in his concurrence in Young, "the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated." Young, 96 S.Ct. at 2458 n.6.

It is in this context that the Court allowed a distinction between sexually oriented speech and other speech. The Court was discussing only whether a state could choose to single out sexually oriented speech from other types of speech without violating its threshold obligation of content-neutrality. The Court concluded that such regulations are content-neutral. Because of that conclusion, and because the ordinance in *Renton* was a zoning ordinance that allowed alternative avenues of communication, the Court applied the reasonable time, place, and manner review. But nothing in *Renton* supports the majority's severing of the time, place, and manner standard from its proper context, and applying that standard to this licensing ordinance. This licensing has a far more substantial impact on speech than zoning because zoning leaves open alternative avenues of communication. The denial of a license is a complete ban on speech.

I can conceive of a licensing law that would be analyzed as a time, place, and manner restriction. For instance, if a government, to prevent overcrowding, required a person to get a license to use a park at a certain hour of the day, that would be a regulation of the time at which the person may speak. The person, however, would still be allowed to speak, although perhaps at a different time than he original [sic] anticipated. The Dallas licensing scheme, however, is a regulation of a different magnitude. It completely prevents certain persons from speaking. It thus does not merely regulate the time, place, or manner in which one may speak, but says one may not speak at all.

Naturally, I agree with the majority that the current regulations are content-neutral. The regulations are justified by concerns unrelated to the suppression of speech. I strongly disagree with the majority, however, on the answer to the ultimate question of the constitutionality of the licensing scheme. I would apply a review stricter than mere reasonableness to content-neutral regulations that have

the effect of totally banning certain speech. I cannot believe that the Supreme Court intended that all regulations of oriented speech are somehow to be judged as time, place, and manner restrictions requiring only a review as to their reasonableness. Although the Court in *Renton* was willing to allow a reasonable time, place, and manner regulation that singled out sexually oriented speech, it still required alternative areas for that speech. Surely, however, the Court would more closely examine a regulation of this speech that does not leave any avenue of communication for the speaker.

Applying a time, place, and manner analysis to a licensing statute that completely bans certain classes of persons from speaking is illogical. Although the majority speaks of deference to the district court's finding that the ordinance allows for reasonable alternative locations for speech, that finding can relate only to the zoning regulations; it cannot relate to this licensing regulation. A person who is completely banned from speech because, for example, he has in the past been convicted of some crime has no other avenue of communication. Cf. Arcara v. Cloud Books, Inc., 106 S.Ct. 3172, 3177 n.2 (1986) (distinguishing an order closing an adult book store from an "unconstitutional prior restraint" partly because the party could carry on his bookselling business in other locations). The time at which he may speak, the place where he may speak, and the manner in which he may speak are not merely being regulated; his entire speech is being extinguished. Therefore, when examining the constitutionality of those parts of the Dallas licensing scheme, which, unlike zoning regulations, completely ban a person from speaking, I strongly believe that the First Amendment requires a standard of review more strict than that contained in the time, place, and manner doctrine.

In Fernandes, this court advanced persuasive reasons for concluding that Freedman's procedural safeguards should apply to even content-neutral regulation of speech.

Although D/FW's regulatory ordinance purports to be content-neutral the consequences flowing from a permit denial here are essentially the same as those addressed in *Freedman*: to an unsuccessful permit applicant, the unavoidable delay posed by judicial review is tantamount to an effective denial of First Amendment rights. Therefore, "[t]he *Freedman* principle is applicable here."

The lack of these procedural protections in this licensing system means that the opportunity to exercise free speech and other associational rights can be postponed for substantial periods of time before adequate review.

Fernandes, 663 F.2d at 628 (citations omitted). This reasoning also applies in the current case. When Dallas denies a license to an adult bookstore or movie theater, it impairs the ability to speak. Likewise, a delay in a judicial determination of the propriety of the denial continues that impairment. Under the ordinance, "the opportunity to exercise free speech and other associational rights can be postponed for substantial periods of time before adequate review." Thus, Fernandes and Freedman require the procedural safeguards.

#### П

I must also dissent from the majority's holdings regarding some of the substantive licensing provisions. Before a license may issue, Section 41-5(a) (6) of the ordinance requires that the premises of a sexually oriented business first be "approved by the health department, fire depart-

ment, and the building official as being in compliance with applicable laws and ordinances." The Seventh Circuit, however, struck down a similar ordinance in Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980).

The ordinance in *Genusa*, like the Dallas ordinance, was partially motivated by a desire to retard urban blight. *Id.* at 1214. The *Genusa* court found however that this interest could not justify special safety inspections, stating "there is nothing in the record to indicate that adult bookstores, as a class, contain more faulty light switches or other violations than regular bookstores, as a class." *Id.* Thus, the court concluded that the ordinance was not shown to further any legitimate interest unrelated to the suppression of free expression. For this reason, the court invalidated the inspection provision. *Id.* at 1215.

Likewise, the City of Dallas has produced no legitimate justification for its prelicensing health, fire, and building code approval requirement.4 Adult bookstores are, of course, subject to the same health and safety laws as any other business. They may not, however, "be singled out for special regulation unless the city can demonstrate that such action is narrowly devised to further a substantial and legitimate state interest unrelated to censorship or the suppression of protected expression." Id. at 1214. Section 41-5(a) (6) is, therefore, not constitutionally justified. Moreover, following this same reasoning, Section 41-7 which the majority characterizes as "a provision permitting warrantless inspection," should be invalid. See id. at 1221 (striking down provision that required biannual warrantless inspections). That section also relates to burdensome health and safety inspections.

I am also troubled by the majority's analysis upholding the provision allowing the denial of license to person convicted of certain crimes. Courts have frequently condemned the denial of a license to engage in speech related activities because of a person's criminal history. As this court has stated, "[p]ersons with prior criminal records are not First Amendment outcasts." Fernandes, 663 F.2d at 630; see also Genusa, 619 F. 2d at 1219 n.40 ("We know of no doctrine that permits the state to deny a person First Amendment liberties other than the right to vote solely because that person was once convicted of a crime or other offense."). The majority cites DeVeau v. Braisted, 80 S.Ct. 1154 (1960) to argue that barring persons with criminal records from certain employment is a common legislative device that needs to pass only minimal scrutiny. However, DeVeau by its own terms applies only to "certain employments closely touching the public interest." Id. at 1154 (discussing sitting on a jury, entering the Army, or holding an office of trust under the United States). Clearly, the government's interest in employment in sexually oriented businesses is not as great as its interest in such vital areas.

A recent Supreme Court opinion, Arcara v. Cloud Books, Inc., 106 S.Ct. 3172 (1986), illustrates statutes that have more than an incidental impact on speech must be strictly scrutinized—even if the statute is an attempt to fight crime. The Court in Arcara upheld a statute allowing the closure of businesses use for prostitution, even as applied to an adult bookstore. However, the reasons given by the Court for not applying strict scrutiny in Arcara illustrate that such scrutiny should apply in the current case. Arcara involved a statute of general application; the statute provided for the closure of any building found to be a public health hazard. The Court relied on the fact that the statute

did not "inevitably single out bookstores or others engaged in First Amendment protected activities for the imposition of its burden..." Id. at 3177.6 The Court held that the First Amendment was not implicated by the statute, Id. at 3178, because it imposed only an incidental burden of the exercise of free speech. Id. at 3177 (stating that the severity of the burden was "dubious at best" and was mitigated by the fact that respondents could sell their material at another location). For that reason the Court declined to apply the strictest scrutiny. Id.

The Dallas ordinance does single out those engaged in First Amendment activity and must use the least restrictive means to accomplish its legitimate purposes. The burden imposed on one denied a license is extremely heavy—for a period of years, that person is denied the ability to engage in certain speech. Before the court is willing to accept such a heavy burden as the least restrictive means, it should require that the City produce "impressive" evidence that allowing convicted felons to speak "will surely result in direct, immediate, and irreparable damage." Fernandes, 663 F.2d at 629-630 (quoting New York Times Co. v. United States 91 S.Ct. 2140, 2149 (1971) (Stewart, J., concurring)).

The majority would not place a heavier burden on the government to support the substantive licensing provisions than the zoning provisions. According to the majority, "[w]hether a license is denied because the business is improperly located or because the business is improperly maintained, the effect is the same—the operator must refrain from the activity and his only alternative is to comply with the Ordinance and obtain a license." However, a person who is prevented from speaking at one location because of a zoning restriction can move to the alternative

location that must exist. A person barred from speaking because of his criminal history has not such option.

Although I understand the majority's desire to not interfere with a city that is struggling to fight crime and urban blight, I am unwilling to let that desire interfere with this court's duty to strictly analyze the methods chosen by the city when those methods directly implicate the First Amendment. Because I believe the majority has not applied the required strict scrutiny, and because some of the chosen licensing provisions and procedures cannot withstand such scrutiny, I respectfully dissent.

2 Section 41-11 of the ordinance provides for the following procedures if a license is denied, suspended or revoked:

If the chief of police denies the issuance of a license, or suspends or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action and the right to appeal. The aggricued party may appeal the decision of the chief of police to a permit and license appeal board in accordance with Section 2-96 of this code. The filing of an appeal stays the action of the chief of police in suspending or revoking a license until the permit and license appeal board makes a final decision.

- 3 Indeed, the First Amendment grew out of a struggle in England over a system of licensing the press. See Near v. Minnesota, 51 S.Ct. 625, 630 (1930). Although the Dallas ordinance does not apply the content-sensitive methods of the English system, "prior restraint doctrine has been invoked to strike down content-neutral permit systems that regulate protected First Amendment activities." Fernandes v. Limmer, 663 F.2d 619, 628 (5th Cir. Unit A 1981).
- 4 In footnote 28 the majority suggests that the Appellants have not raised this issue. The majority says that the Appellants' only attack on Section 41-5(a)(6) is that the section case too much discretion in city officials. However, the Appellants' arguments about discretion are clearly a First Amendment challenge to Section 41-5(a)(6). Thus, the Appellants have raised the issue of the section's constitutionality. Additionally, in attacking Section 41-7, the post-licensing inspection provision, the Appellants quote Genusa in raising the issue of the

<sup>1</sup> The time, place, and manner doctrines generally only apply to regulations of speech in public forums and to zoning regulations. See generally 3 R. Rotunda, J. Nowak, & J. Young, Treatise on Constitutional Law: Substance and Procedure ch. XIII (1986).

- city's justifications for imposing additional health, safety, and building code requirements. Thus, I would think that this court may now address whether Section 41-5(a)(6) is legitimately justified.
- 5 I stress that I would invalidate this provision on First Amendment grounds, and I thus give no opinion regarding the Fourth Amendment challenge.
- 6 Moreover, the Court Distinguished Arcara from cases involving prior restraints because the respondent could simply move to another location to continue his bookselling. 106 S.Ct. at 3177 n.2.

#### APPENDIX B

# IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86-1723

FW/PBS, INC., ETC., ET AL.,

Plaintiffs-Appellants

versus

THE CITY OF DALLAS, ETC., ET AL.,

Defendants-Appellees.

JOHN RANDALL DUMAS d/b/a/ GENO'S,

Plaintiff,

TEMPO TAMERS, INC., ETC., ET AL.,

Plaintiff-Appellants,

versus

CITY OF DALLAS, ETC.,

Defendant-Appellee.

CALVIN BERRY, III, ET AL.,

Plaintiff-Appellants,

versus

CITY OF DALLAS, ETC., ET AL.,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Texas

#### ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion 2/12/88, 5 Cir., 1988, \_\_\_\_ F,2d \_\_\_\_) (March 14, 1988)

Before THORNBERRY, GARWOOD and HIGGIN-BOTHAM, Circuit Judges.
PER CURIAM:

Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. Judge Thornberry would grant hearing for the reasons expressed in his dissent to the majority opinion. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/ s / Patrick E. Higginbotham United States Circuit Judge

#### APPENDIX C

# IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86-1723

FW/PBS, INC. ETC. ET AL., versus

Plaintiffs-Appellants,

THE CITY OF DALLAS, Etc,

ET AL.,

Defendants-Appellees.

JOHN RANDALL DUMAS, d/b/a GENC'S Plaintiff.

TEMPO TAMERS, INC. ETC.

ET AL.,

Plaintiffs-Appellants,

CITY OF DALLAS, ETC.,

Defendant-Appellee.

CALVIN BERRY, III, ET AL., Plaintiffs-Appellants,

versus

CITY OF DALLAS,

ETC. ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

# ORDER:

The motion of appellants for kx stay \( \text{recall and stay of } \)
the issuance of the mandate pending petition for writ of certiorari is DENIED.
☐ The motion of
for $\square$ stay $\square$ recall and stay of the issuance of the mandate
pending petition for writ of certiorari is GRANTED to and
including, the stay to continue
in force until the final dispositon of the case by the
Supreme Court, provided that within the period above
mentioned there shall be filed with the Clerk of this Court
the certificate of the Clerk of the Supreme Court that the
certiorari petition has been filed. The Clerk shall issue the
mandate upon the filing of a copy of an order of the
Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certifi-
cate shall be filed with the Clerk of this Court within that
time.
· · · · · · · · · · · · · · · · · · ·
☐ The motion of
for a further stay of the issuance of the mandate is
GRANTED to and including
under the same conditions as set forth in the preceding
paragraph.
☐ The motion of
for a further stay of the issuance of the mandate is
DENIED

/s/Patrick E. Higginbotham UNITED STATES CIRCUIT JUDGE

# UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

# OFFICE OF THE CLERK April 5, 1988

GILBERT F. GANUCHEAU CLERK TEL. 504-589-6514 600 CAMP STREET

NEW ORLEANS, LA 70130

Mrs. Nancy Hall Doherty, Clerk United States District Court 1100 Commerce St., Rm 14A20 Dallas, TX 75242

No. 86-1723 - FB/PBS, Inc., et al. -vs- City of Dallas, et al. USDC# CA3-86-1759-"R" c/w 86-1901

Enclosed herewith are the following additional documents: Copy of the Court's opinion. Original record on appeal or review. 14 Volumes. Other original papers forwarded with record. Envelope 1 Box. ☐ Bill of Costs approved by this Court. ☐ Copy enclosed to counsel. Sincerely, cc: (Letter Only) Hon. Jerry Buchmeyer GILBERT F. GANUCHEAU, Mr. Malcolm Dade Clerk Mr. Arthur M. Schwartz Mr. Frank P. Hernandez By: /s/\_ Mr. Richard L. Wilson Deputy Clerk Mr. David LaBrec Mr. Bruce A. Taylor MDT-1 Rev. 10/86 APPENDIX D

# SUPREME COURT OF THE UNITED STATES

No. A-800

FW/PBS, INC., DBA PARIS ADULT BOOKSTORE II, ET AL.,

Applicants,

V.

CITY OF DALLAS, ET AL.

ORDER

UPON CONSIDERATION of the application of consideral for the applicants,

IT IS ORDERED that the judgment and mandate of the United States Court of Appeals for the Fifth Circuit, Case No. 86-1723, are stayed pending receipt of responses and further order of the undersigned or of the Court.

/s/Byron R. White Associate Justice of the Supreme Court of the United States

Dated this 20th day of April, 1988.

#### APPENDIX E

ORDER LIST

WEDNESDAY, MAY 4, 1988

ORDER IN PENDING CASE

A-800 FW/PBS, INC., DBA PARIS ADULT BOOKSTORE II, ET AL. V. CITY OF DALLAS, ET AL.

The application for stay filed with Justice White has been referred to the Court. Justice White's temporary stay is hereby vacated. The application for stay is granted and the judgment of the United States Court of Appeals for the Fifth Circuit is stayed except for its holding that the provisions of the ordinance regulating the location of sexually-oriented businesses do not violate the Federal Constitution pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to continue in effect pending the sending down of the judgment of this Court.

#### APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

FW/PBS, INC., DSB, INC., CHARLES E. CARLOCK, LONE STAR MULTI THEATRES, BEVERLY K. VAN DUSEN, BILL STATEN, JR., BI-TI ENTERPRISES, INC., GATTIE CORPORATION, J.R.E. ENTERPRISES, ENTERTAINMENT UNLIMITED, JOHN RANDALL DUMAS, SOUTHERN BELLES PARTNERSHIP. BIMBO BARS, INC., S.B. La BARE INC., S.B. YOUNGBLOODS, INC., TEMPO TAMERS, INC., CORPORATION LEX, INC., JOHN R. DUMAS, INC., M.J.R., INC., D. BURCH, INC., DE JA VU, INC., ALLEN & BURCH, INC., CALVIN BERRY, III, SAUJAY PATEL, MUDOLF FERNANDEZ, and DALLAS MOTEL ASSOCIATION

VS.

CA3-86-1759-R

THE CITY OF DALLAS,

A. STARKE TAYLOR, and BILLY PRINCE

# ORDER OF JUDGMENT

Defendant's motion to dismiss is DENIED and their motion for summary judgment is GRANTED, but DENIED as to subsections 45A-5(a)(8), 41A-5(c), part of 41A-5(a)(10)("under indictment"), and 41A-5(a)(10)(A)(iii), (vi)-(ix). Plaintiff's motions are GRANTED only to those

subsections. The City is enjoined from enforcing the subsections, and they are severed (id. at section 41A-23[5]). Thus limited, the Ordinance is constitutional.

Signed this 12th day of September, 1986.

/ s / JERRY BUCHMEYER United States District Judge

#### APPENDIX F2

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

FW/PBS, INC. et al.

VS.

CA3-86-1759-R

THE CITY OF DALLAS, et al.

# MEMORANDUM OPINION

The law of zoning allows the will of a majority, expressed through a representative body, to control the evolution of a community and shape its character. The law of free speech, in contrast, prevents the majority will from suppressing minority expression that the majority finds intolerable. It is perhaps inevitable that the two values should clash, when a zoning ordinance attempts to limit the freedoms of those involved in expressing unpopular views. A body of first amendment/zoning jurisprudence has thus emerged, in an attempt to reconcile this potential for conflict. Because the zoning law under attack in this case — the recently enacted "sexually oriented business" ordinance of

the City of Dallas — follows the dictates of this recent hybrid body of law, it is constitutional, except for the four minor exceptions discussed below.<sup>5</sup>

#### I. The Ordinance

On June 12, 1986, the Dallas city attorney presented aproposed ordinance regulating sexually oriented businesses to the Dallas City Plan Commission. The Commission considered studies carried out in other cities, but did not undertake a study of Dallas. See Defendants' Exhibit (DX) 6 (Austin), DX 7 (Indianapolis), and DX 11 (Los Angeles). The Commission did consider, however, a map of Dallas indicating areas in which sexually oriented businesses could locate under the proposed ordinance. See Transcript (DX 1) at 5, 30-33. The Commission also heard public testimony, both for and against the proposed ordinance. See id. at 11-51. The Commission voted unanimously to recommend adoption of an ordinance regulating sexually oriented businesses.

The Ordinance went before the Dallas City Council on June 18, 1986. The Council considered the three studies that were before the Commission, see Transcript (DX 17) at 3. The Council also considered a Dallas study comparing crime rates in two commercial sections, one with sexually oriented businesses and one without. See id. at 3 (finding crime rates 90 percent higher in adult district). After hearing public comment — unanimously in favor of the ordinance — the Council adopted it by unanimous vote. See id. at 28. Both representative bodies were in unanimous accord on the benefits of the ordinance.

Legislative intent. Divining the intent of a legislative body is inherantly problematic, but the intent of both the Commission and the Council in adopting the Ordinance is transparently clear. Five of the 15 members of the Commission<sup>8</sup> and four of the 11 members of the Council<sup>9</sup> stated unequivocally - to no dissent - that the Ordinance was concerned solely with controlling the secondary effects of sexually oriented businesses on surrounding neighborhoods.10 Both groups stated that they were concerned not with the content of the speech associated with sexually oriented businesses, but with the crime, urban blight, and plummeting property values that inevitably seize the neighborhoods where such businesses locate. It is of no moment that the public speakers in favor of the Ordinance supported it almost singularly in hopes that it would indeed suppress the speech purveyed by sexually oriented businesses,11 as neither the Council nor the Commission relied on the specious view that pornography "causes" various social ills and should thus be eliminated. 12 The intent of the City in passing the Ordinance was solely to control the secondary effects of sexually oriented speech on the neighborhoods its purveyors inhabit, rather than to eliminate the speech itself.

The Council's findings. The Ordinance enacted by the City incorporated several findings. The City first found that it has authority to regulate businesses pursuant to its police power, and that licensing is a reasonable means to ensure that subject businesses comply with regulations. See Ordinance (DX 16) at 2. The Council then found that a substantial number of sexually oriented businesses require regulation to protect the "health, safety, and welfare" of the establishments' patrons and citizens in general. Public safety authorities should regulate such businesses, the Council reasoned, because the businesses "are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature" and because of the

"concern over sexually transmitted diseases." Id. The Council next found that arrests for sex-related crimes near sexually oriented businesses have been "substantial," and that there is "convincing documented evidence" that sexually oriented businesses are associated with falling property values of surrounding business and residential areas. Then, the Council found that when such businesses are located in close proximity to one another, "urban blight" and a decrease of the quality of life in adjacent areas results. Finally, the Council stated that its intent was to minimize these adverse effects, thus preserving property values in surrounding neighborhoods, detering the spread of urban blight, and decreasing crime. Id. at 5. The Council emphasized, however, that it did not intend to limit access by adults to sexually oriented material protected by the first amendment. Id.13

The Ordinance's terms. Based on these findings, the Council enacted an ordinance that pervasively regulates the operation of all sexually oriented businesses in Dallas. The most important changes made by the Ordinance, which is discussed in detail with the relevant arguments, are (1) strict locational prohibitions, including the requirement that a business be at least 1,000 feet from another sexually oriented business, or a church, school, residential area, or park:14 (2) required licensing and inspection for all regulated businesses; (3) disqualification from licensure of any applicant who has been convicted of a specified crime, or whose spouse has been so convicted; (4) requirements that all patrons in an arcade - even if within a closed booth be within the sight of a manager; and (5) various layout, furnishing, hiring, and lighting restrictions on regulated businesses.

#### II. The Plaintiffs

The plaintiffs in this case operate seven of the nine types of sexually oriented businesses classified in the Ordinance: (1) adult arcades; (2) adult bookstores or adult videostores; (3) adult cabarets; (4) adult motels; (5) adult motion picture theatres; (6) adult theatres; and (7) nude model studios. There are no escort agencies or sexual encounter centers that have appeared to challenge the Ordinance. 15

Under section 41A-13(f) of the Ordinance, each business is deemed a "nonconforming use" because of its location within 1000 feet of another sexually oriented business, or a church, school, residential district, or park. The plaintiffs may continue their business for a period of three years from June 18, 1986, unless "sooner terminated for any reason or voluntarily discontinued for a period of 30 days or more." Plaintiffs are also prohibited from "increasing, extending, or altering" their businesses unless they are changed to a conforming use. At the conclusion of the three-year period under 41A-13(f), only the "first-established and continually operating" sexually oriented business at a particular location may continue to operate — so that the dispersal of sexually oriented businesses in Dallas will be completed by June 18, 1989. 16

The Ordinance would force many plaintiffs to relocate. Many are near specified-use areas; others are within 1000 feet of one another—as are plaintiffs Deja Vu, Texas Rose, Baby Dolls Saloon, Mallion Dollar Saloon II, Expose, and Bachman Cafe. The relocation provisions threaten the businesses with enormous expenditures; many have great investments in their locations and the value of their property—such as S.B. Sugars, Inc., which has obtained financing on a parking lot valued at \$1,000,000. Other

plaintiffs face economic hardship from the Ordinance's restrictions on their activities. Adult motels, for example, will be restricted to renting rooms for at least ten hours, rather than the two-hour period common now — thus cutting their income by up to 80 percent.

The main attack in this case is, therefore, the location restriction and the three-year amortization period of section 41A-13(f). Plaintiffs also level attacks against each provision of the Ordinance that applies to them, claiming that the Ordinance's provisions are vague and overbroad, that is licensure requirement is unconstitutional, that it vests overbroad discretion in the Chief of Police, and that the Ordinance is not sufficiently related to the City's objectives.

# III. Standing

As a threshold issue, the City makes the argument apparently one considered obligatory in cases such as this - that various defendants have no standing to challenge the Ordinance. See City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983); Brown v. Edwards, 721 F.2d 1442, 1446-47 (5th Cir. 1984). Moreover, the City claims that the plaintiffs' challenges are not ripe, because there is no "real and immediate threat" of closure of their businesses. Plaintiffs do not, however, present "abstract" questions of possible injuries. There is no doubt that the Ordinance, once effective, would pervasively change the manner in which each plaintiff runs his or her business; many would close. "It is clear that a party may challenge a licensing statute regardless of whether he or she was denied a permit, or whether one has ever been sought." Fernandes v. Limmer, 663 F.2d 619, 625 (5th Cir. 1981); see also Star Satellite, Inc. v. City of Biloxi, 779 F.2d 1074, 1078 (5th Cir. 1986); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969). The City's position amounts to a claim that plaintiffs' attacks could be asserted as a defense to an eventual state prosecution for defiance of the Ordinance. Such a forum would not, however, protect plaintiffs' rights. See Dombrowski v. Pfister, 380 U.S. 479 (1965) (defense in state suit "will not assure adequate vindication of constitutional rights . . . a substantial loss of or impairment of freedoms of expression will occur if appellants must await the state court's disposition"); Steffel v. Thompson, 415 U.S. 452 (1974); Gibson v. Berryhill, 411 U.S. 564, 577 (1973); Gerstein v. Pugh, 423 U.S. 103, 108 N.9 (1975). No state prosecution is underway, and the complete determination of plaintiffs' claims here will aid and expediate the City's efforts, rather than delaying and hindering them. 17 Cf. Huffman v. Pursue, Ltd., 420 U.S. 592, 604-05 (1975); Trainor v. Hernandez, 431 U.S. 434, 440 & n.8 (1977). Under the factual allegations presented, plaintiffs do have standing to challenge the Ordinance and their challenge is ripe for determination.

# IV. Constitutionality

Regardless of the Ordinance's focus on the secondary effects of sexually oriented businesses, there is no doubt that its terms have an incidental impact on expression that is protected by the first amendment. Because of this impact, it is appropriate to analyze the statute under the four-part test of United States v. O'Brien, 391 U.S. 367, 377 (1968). See City of Renton v. Playtime Theatres, Inc., 54 U.S.L.W. 4160 (U.S. Feb. 25, 1986); Young v. American Mini Theatres, 427 U.S. 50, 79 (1976) (Powell, J., concurring). Under the O'Brien test, regulation is justified despite its

impact on first amendment interests "[1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on . . . first amendment freedoms is no greater than is essential to the furtherance of that interest." O'Brien, 391 U.S. at 377. Incidental burdens on free expression may be analyzed under this test as time, place, and manner regulations. Renton, 54 U.S.L.W. at 4161. 19 The first three elements may be considered without reference to the specific requirements of the Ordinance; a determination of whether the Ordinance's particular terms follow the least restrictive means available must, however, be made independently for each of the Ordinance's restrictions.

First, it is without doubt that the police power of the City encompasses the power to enact a zoning and regulatory ordinance such as that considered here. See ante at 1 n.1; see also Renton, 54 U.S.L.W. at 4161 (similar ordinance within police power). Second, the interests the City studied and intended to further by the Ordinance — crime control, protection of property values, and prevention of urban blight, see ante at 4-5 & nn.8-9 — are both important and substantial. See Young, 427 U.S. at 49 (Powell, J., concurring).20 Third, the intent of the City - garnered from complete reports of both the Plan Commission and City Council proceedings - demonstrates that the governmental interest was unrelated to the suppression of free expression. See ante at 4-5 nn. 8-10. The legislative response to the secondary effects of sexually oriented businesses evinced a clear intent to leave alternative avenues open for expression of that genre, while lessening the effects

of such businesses on the surrounding community.<sup>21</sup> The first three elements of the O'Brien test are satisfied; evaluation of the fourth factor requires reference to each challenged section of the Ordinance.

Locational restrictions. The element of the Ordinance that is most vigorously challenged is the one element that is least susceptible to challenge after Young and Renton. Section 41A-13 states that a sexually oriented business cannot be located within 1000 feet of (1) a church; (2) a public or private elementary or secondary school; (3) a boundary of a residential district; (4) a public park adjacent to a residential district; (5) the property line of a lot devoted to residential use; or (6) another sexually oriented business. If a regulated business is currently in violation of this section, it is deemed a nonconforming use and allowed to continue to operate for three years. A properly located regulated business is not rendered a nonconforming use by the subsequent location of a church, school, park, or residential area within 1000 feet of the business.

No doubt remains after Renton and Young that dispersed zoning of sexually oriented businesses is permissible, provided that "reasonable alternative avenues of communication" exist. See Renton, 54 U.S.L.W. at 4162; see also Schad v. Borough of Mount Ephraim, 452 U.S. 104, 116 (1972). In Young, a Detroit zoning plan similar to that challenged here was approved, but "[t]he situation would have been quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." Id. at 71 n.35; accord, Basiardanes v. City of Galveston, 682 F.2d 1203, 1214 (5th Cir. 1982) (only "oppressive options remained to an aspiring promoter of adult films"); Olmos Realty Co. v. State, 693 S.W.2d 711, 714 (Tex.Civ.App.—San

Antonio, no writ); Keego Harbor Co. v. Keego Harbor, 657 F.2d 94 (6th Cir. 1981) (ordinance prohibited all theatres); Alexander v. City of Minneapolis, 698 F.2d 936, 937-38 (8th Cir. 1983) (ordinance led to closing all theatres); Purple Onion, Inc., v. Jacksonville, 511 F. Supp. 1207, 1217 (N.D. Ga. 1981) (sites either "unavailable, unusable, or so inaccessible to the public [that] they amount to no locations"); Renton, 54 U.S.L.W. at 4167 (Brennan, J., dissenting) (must have "reasonable" opportunity to locate within the city; the Court expressly rejected findings of fact that the 520 acres left open by the ordinance was not truly "available" for regulated use.<sup>22</sup>

The land available for sexually oriented businesses under the Dallas ordinance is substantial, and satisfies Basiardanes and Renton. The maps considered by the City upon enacting the Ordinance detail several areas that are open to sexually oriented businesses, and it cannot be said that a "reasonable" opportunity for such businesses does not exist under the Ordinance. The plan adopted by Dallas differs markedly from the Galveston plan rejected in Basiardanes, 682 F.2d at 1214; that plan incorporated an outright ban on 85-90 percent of the city's total area, and the remaining areas, located "among warehouses, shipyards, undeveloped areas, and swamps," were reached by "few access roads." Id. The Dallas plan, in contrast, permits location in several areas stretching from the inner city area to the north and south suburbs, accessed by such major thoroughfares as Interstate 35, Interstate 30, Loop 12. Highway 183, and Harry Hines Boulevard. Eight to ten percent of the city's total area - 21,000 acres - is available. Cf. Renton, 54 U.S.L.W. at 4163 (5 percent). See DX 15; PX 1; DX 27. There is no impediment to the locational restrictions enacted in the Ordinance.23

The three-year amortization clause is also challenged. Such clauses, however, are uniformly upheld. See Hart Bookstores v. Edmisten, 612 F.2d 821, 830 (4th Cir. 1979), cert. denied, 100 S. Ct. 3028 (1980) (upholding six-month amortization period); Northend Cinema, Inc. v. Seattle, 90 Wash.2d 709, 585 P.2d 1153, 1160 (1978), cert, denied sub nom. Apple Theatre v. Seattle, 441 U.S. 946 (1979) (upholding three-month amortization period); see also Note, Using Constitutional Zoning to Neutralize Adult Entertainment - Detroit to New York, 5 Fordham Urban L.J. 455, 472-74 (1977) (advocating one-year amortization period); SDJ, Inc. v. City of Houston, 636 F. Supp. 1359, 1371 (S.D. Tex. 1986) (six-month period). See generally Lubbock Poster Co. v. City of Lubbock, 569 S.W.2d 935, 940-43 (Tex.Civ.App.-Amarillo, writ ref'd n.r.e).24 The period allowed by the Ordinance is more generous than others that have been upheld; it is a valid mechanism used to enforce valid locational regulations.25

Licensure requirement. Although there is no constitutional impediment to the concept of requiring sexually oriented businesses to obtain licenses<sup>26</sup> and pay reasonable fees,<sup>27</sup> plaintiffs challenge the manner in which the licensing scheme is implemented and the qualifications the scheme imposes upon licensees. The challenge is sustained only as to subsections 41A-5(a)(8), 41A-5(a)(10)(B)(c), part of 41A-5(a)(10), and 41A-5(10)(A)(iii) and (vi)-(ix); the City will be enjoined from enforcing those sections, which may be easily severed from the remainder of the Ordinance.<sup>28</sup>

It is settled constitutional principle that any license requirement for an activity related to expression must contain narrow, objective, and definite standards to guide the licensing authority. See Shuttlesworth v. Birmingham,

394 U.S. 147, 150-151 (1969); Saia v. New York, 334 U.S. 558 (1948). The City argues that the Ordinance vests no discretion in the Chief of Police, as it states that he "shall" approve the issuance of a license "unless" a factual basis for denial exists. This assertion is largely correct, but it is a simplistic view of the actual operation of two subsections of the Ordinance. First, section 41A-5(a)(8) allows the police chief to deny a license to an applicant who has been employed in a sexually oriented business on a finding that "he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner" (emphasis added).29 Second, the Ordinance allows an applicant with a past conviction to be granted a license if the sufficient amount of time has elapsed, but section 41A-5(c) allows the police chief to grant a license to such an applicant "only if the chief of police determines that the applicant or applicant's spouse is presently fit to operate a sexually oriented business" (emphasis added). Neither section provides sufficiently definite standards to pass constitutional muster.

Both sections ask the police chief to make subjective judgments on the fitness of an applicant; neither, then, is controlled by standards "susceptible of objective measurement." Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1967). The Ordinance is silent to what conduct may reasonably be considered operation of a business in a "peaceful manner." The Ordinance is more specific in addressing the "present fitness" of an applicant with a past conviction; in at least one case, however, the specificity itself constitutes overbroad discretion — one factor the police chief is to take into account is "the amount of time that has elapsed since his last criminal activity." See subsection 41A-5(c)(3). Under

thus subsection, then, the police chief is permitted to extend indefinitely the periods specifically enumerated by the Ordinance in subsections 41A-5(a)(10)(B)(i-iii). By reference to the "extend and nature" of the applicant's past criminal activity, id. at 41A-5(c)(1), the applicant's age at the time of the offense, id. at 41A-5(c)(2), the applicant's "conduct and work activity," id. at 41A-5(c)(4), evidence of the applicant's "rehabilitation," id. at 41A-5(c)(5), and letters "from prosecution, law enforcement, and correctional officers," id. at 41A-5(c)(6), then, the police chief may determine that an applicant will not be granted a license. These two subsections vest unfettered discretion in the police chief, and cannot survive constitutional scrutiny. 31

Shorn of the two sections that vest subjective and unguided authority in the police chief, however, the largest part of the licensure section is constitutional. The findings the police chief must make in licensing sexually oriented businesses are based on objectively determinable facts, and are thus permissible. See Memet v. State, 642 S.W.2d 518, 524 (Tex.Civ.App.-Houston [14th Dist.] 1982, writ ref'd n.r.e.). Age restrictions are factually based, see subsection 41A-5(a)(1), as are determinations of past due fees and taxes, see id. at 41A-5(a)(2), and false statements on application forms, see id. 41A-5(a)(3),32 see Schope, 647 S.W.2d at 680 (upholding ordinance including such factors); Bayside Enterprises v. Carson, 470 F. Supp. 1140, 1148 (M.D. Fla. 1979) (upholding unpaid tax or fee provision); Genusa, 619 F.2d at 1219-20 (upholding provision for false statements). Failure to comply with the Ordinance, subsections 41A-5(a)(4) and (9), may be objectively verified, as may approval of premises by health, fire, and building officials, subsection 41A-5(a)(6). See SDJ, Inc. v. City of Houston, 636 F. Supp. at 1368-69 (S.D. Tex. 1986). Whether an applicant resides with someone who has been recently denied a license or whose license has been revoked, 33 subsection 41A-5(1)(5), may be objectively verified. Finally, although this Court agrees that "persons with prior criminal records are not first amendment outcasts," Fernandes v. Limmer, 663 F.2d 619, 630 (5th Cir. 1981), cert. dismissed, 458 U.S. 1124 (1982), denial of licensure to those convicted of certain specified crimes that are related to the crime-control intent of the law is undoubtedly permitted. 34

Five enumerated crimes, however, are not sufficiently related to the purpose of the Ordinance to withstand scrutiny. Although thirteen of the offenses are clearly related to the purpose of the Ordinance as it was debated by the City, no findings exist to justify prohibiting one convicted of (1) a controlled substances act violation, (2) bribery, (3) robbery, (4) kidnapping, or (5) organized criminal activity from obtaining a license to operate a sexually oriented business. In the absence of such findings, this Court cannot say that the offenses enumerated are sufficiently related to the purpose of the Ordinance - either for constitutional purposes, or for purposes of the City's authority under Texas law. See Young, 427 U.S. 50, 56 n.11;35 see also Tex. Civ. Stat. Ann. art. 6252-13c (supp. 1986) (denial of license proper only if crime "directly relates to an occupation"). Subsections 41A-5(a)(10)(A)(iii), (vi), (vii), (viii) and (ix) are thus constitutionally and statutorily invalid.

The language of subsection 41A-5(a)(10) that compels the police chief to deny licensure to an applicant "under indictment or misdemeanor information" for a specified crime must also fail. Although the City undoubtedly has a

legitimate interest in preventing one convicted of a specified crime from holding a license, see ante at 26 and n.34, denial on the basis of mere indictment or information cannot pass constitutional scrutiny.36 An indictment or information is not evidence of an applicant's guilt, but merely indicates that an ex parte procedure navigated solely by a prosecutor has resulted in a finding of probable cause. See United States v. Calandra, 414 U.S. 338, 344-45 (1974). The simple act of indictment or information cannot carry the heavy burden implicit in suppressing speech that is protected by the first amendment,37 and may implicate overbreath in chilling protected speech.38 Dispositively, however, the prohibition against licensure of one under indictment or information fails the fourth O'Brien test in that less restrictive means of accomplishing the legislative goal exist. If the City intends to forestall revocation procedures against one who is eventually convicted of a specified crime by denying a license to an applicant under indictment, it may easily accomplish this purpose by amending to defer decision for a limited period of time<sup>39</sup> on an application to see if an adjudication of guilt has been made during this period - requiring denial and subsequent reapplication is both inefficient, see Posner, Economic Analysis of the Law, passim (1972) (duplicative expending of administrative and legal resources), and constitutionally infirm.40

Plaintiffs also attack various procedural aspects of the licensure system, including the appeal process, under Freedman v. Maryland, 380 U.S. 51 (1965). Primary to their contention is their claim that "no judicial review is provided for." This assertion, however, is entirely meritless. Although no provision for judicial review is made, "none is needed. One denied a permit may seek a hearing, appeal that

hearing, and then turn to courts of law." Memet, 642 S.W.2d at 524; see also Dixon v. Love, 431 U.S. 105 (1977); Harper v. Lindsay, 616 F.2d 849, 858 (5th Cir. 1980). The appeal, revocation, and suspension provisions are replete with procedural protections and reviewable standards, and comport with Freedman and fundamental tenets of due process.

Definitions. Vagueness challenges are imposed against the various definitions and terms utilized in the Ordinance. All terms used, however, are designed to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute," Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1971), in light of common understanding and practices. 41 Grayned v. City of Rockford. 408 U.S. 104, 110 (1971). Indeed, the language of many provisions has been taken from ordinances upheld by the Supreme Court, see Young, 427 U.S. at 53 ("specified sexual activities" and "specified anatomical areas"); City of Renton, 54 U.S.L.W. at 4161 ("primary purpose"). Other elements of the Ordinance have been upheld by the courts. See Hart Bookstores v. Edmisten, 612 F.2d 821, 833 (4th Cir. 1979). cert. denied, 447 U.S. 929 (1980) ("distinguished or characterized by"; Miller v. California, 413 U.S. 15, 24 (1973) ("depicting or describing"); Hart Bookstores, 612 F.2d at 834 ("adult bookstore"); Stansberry v. Holmes, 613 F.2d 1285, 1290 (5th Cir. 1980) ("major business," similar to "principal business purpose" used in Ordinance):42 Basiardanes v. City of Galveston, 682 F.2d 1203, 1210 (5th Cir. 1982) ("regularly" features); Northend Cinema, Inc. v. Seattle, 90 Wash.2d 709, 585 P.2d 1153 (1978), cert. denied sub nom. Apple Theatre v. Seattle, 441 U.S. 946 (1979) ("adult theatre"); 15192 Thirteen Mile Road, Inc. v. City of Warren, 626 F. Supp. 803, 808 (E.D. Mich. 1985) ("escort agency"); SDJ, Inc. v. City of Houston, 636 F. Supp. at 1364 (topless bars). 43 There is no constitutional impediment to the phraseology of the Ordinance.

Internal restrictions. The Ordinance requires various internal restrictions of regulated businesses — from major renovations in the design of adult arcades to the allowance of sofas in nude modeling studios. While such intrusions into the internal design of regulated businesses may seem unduly restrictive, they have consistently been upheld.44 See Wall Distributors, Inc. v. City of Newport News, 782 F.2d 1165, 1169 (4th Cir. 1986) (requiring closed viewing booths to be within view of management "falls within the broad general limits of the police power" and satisfies O'Brien); Ellwest Stereo Theatres v. Wenner, 681 F.2d 1243, 1246 (9th Cir. 1982) (same); EWAP, Inc. v. City of Los Angeles, 92 Cal.App.3d 179, 158 Cal. Rptr. 579 (1979) (same); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207, 1227 (N.D. Ga. 1981) (nude modeling studios may be pervasively regulated, as they contain no element of "expression"); Upper Midwest Booksellers v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1985) (display to minors); Pollard v. Cockrell, 578 F.2d 1002, 1013 (5th Cir. 1978) (permissible to distinguish between "legitimate" and regulated use of nude models). The City did indeed make sufficient findings to justify restrictions on adult motels, see ante at 4 n.9 (statement of Ms. Ragsdale), cf. Patel & Patel v. South San Francisco, 606 F. Supp. 666, 671 (N.D. Cal. 1985) (no findings); moreover, recent pronouncements of state power to regulate morality and private consensual sexual activity are probably broad enough to encompass regulations on adult motels. See Bowers v. Hardwick, 54 U.S.L.W. 4919 (U.S. June 30, 1986) (no privacy right to consensual homosexual, and, arguably, heterosexual sodomy); Baker v. Wade, 769 F.2d 289 (5th Cir. 1985) (en banc), cert. denied, 54 U.S.L.W. 3863 (U.S. July 7, 1986). 45 As the City has made the requisite findings, the various

restrictions on the operation, layout, design, and furnishing of regulated businesses must be upheld. See Young, 427 U.S. at 56 nn. 11-12.

Summary. Only the four subsections described above — 41A-5(a)(8), 41A-5(c), the "under indictment or information" language of 41A-5(a)(10), and the five unrelated crimes of 41A-5(a)(10) — fail to satisfy the fourth prong of the O'Brien test. The ordinance is thus constitutional, with the above minor exceptions — which are severable, see section 41A-23(5), and may be cured by amendment.

#### IV. Conclusion

Efforts to restrict the accessability of sexually oriented speech bave long been part of Western legal tradition, <sup>46</sup> as has the principle that expression should be free and unfettered. <sup>47</sup> The reconciliation of the competing values implicit in these two long-standing concepts inevitably shifts over time, in response to technological change <sup>48</sup> and evolving conceptions of the legality of legislating majoritarian conceptions of morality. <sup>49</sup> Restrictions in the place and manner of sexually oriented expression through zoning regulation is the most recent jurisprudential attempt to allow majority community structure to coexist with minority expression; the sexually oriented business ordinance enacted by the City follows the substantive dictates of this body of law, and must be upheld.

Signed this 12th day of September, 1986.

/ s / JERRY BUCHMEYER United States District Judge

#### APPENDIX F FOOTNOTES

- 1 See Euclid v. Amber Realty, 272 U.S. 365 (1926) and Lombardo v. Dallas, 124 Tex. 1, 73 S.W.2d 475 (1934) (first establishing that zoning is a proper exercise of the police power), overruling Spann v. Dallas, 111 Tex. 350, 235 S.W. 513 (1921) (zoning as unauthorized intrusion on property rights); Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (zoning may promote "family values [and] youth values"); Berman v. Parker, 348 U.S. 26, 33 (1954) (zoning may promote values that "are spiritual as well as physical, aesthetic as well as monetary"); Stansberry v. Holmes, 613 F.2d 1285, 1288 (5th Cir.), cert. denied, 449 U.S. 886 (1980) (zoning provides one of the firmest and most basic of the rights of local control").
- 2 See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the ultimate good desired is better reached by free trade in ideas"); Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring) (state is "denied the power to prohibit dissemination of social, economic, and political doctrine which a vast majority of its citizens believes is false and fraught with evil consequence"); United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) (constitution embodies principle of "free thought - not free thought for those who agree with us but freedom for the thought we hate"); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (Ku Klux Klan); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (the "right to receive information and ideas, regardless of their social worth, is fundamental"); Cohen v. California, 403 U.S. 15, 25 (1971) ("in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated"); Heffron v. International Soc'y for Krishna Consciousness, 452 J.S. 640, 648 (1982); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).
- 3 See Goldman v. Weinberger, 54 U.S.L.W. 4298, 4304 (U.S. 1986) (Brennan, J., dissenting) ("in pluralistic societies such as ours, institutions dominated by a majority are inevitably, if inadvertently, insensitive to the needs and values of minorities when these needs and values differ from those of the "najority").
- 4 See Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976); New York v. Uplinger, 467 U.S. 246 (1984); City of Renton v. Playtime Theatres, Inc., 54 U.S.L.W. 4160 (U.S. Feb. 25, 1986); New York v. P.J. Video, 54 U.S.L.W. 4396 (U.S. April 22, 1986); Arcara v. Cloud Books, Inc., 54 U.S.L.W. 5060 (U.S. July 7, 1986); Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982); Stansberry v. Holmes, 613 F.2d 1285 (5th Cir.), cert. denied, 449 U.S. 886 (1980); Hart Bookstores v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929 (1980); Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980); Northend Cinema, Inc. v. Seattle, 90 Wash.2d 709, 585 P.2d 1153 (1978), cert. denied sub nom. Apple Theatre v. Seattle, 441 U.S. 946 (1979). See also United States v. O'Brien, 391 U.S. 367 (1968); Schad v. Mount Ephraim, 452 U.S. 61 (1981); Erznoznick v. City of Jackson-ville, 422 U.S. 205 (1975).

- 5 This opinion resolves the case on cross-motions for summary judgment, because there are no genuine issues of material fact. See Celotex Corp. v. Catrett, 54 U.S.L.W. 4775 (U.S. June 25, 1986). The Dallas sexually oriented business ordinance is attached as Appendix A.
- 6 The rubric of "sexually oriented business" was apparently adopted not because it yielded a snappy, if somewhat unfortunate, acronym ("S.O.B."), but because a witness before the Commission testified that the alternative term, "adult entertainment," is one "that the pornographers invented to sort of dilute the anguish that people would have if they knew what was actually going on in these places." Transcript (DX 1) at 15 (testimony of Elvin Arnold, Dallas Ass'n for Decency); see also DX 17 at 4 (reflecting cause for name change was Arnold's testimony).
- 7 Determining legislative intent here does not involve the thorny problems courts have associated with drawing intent from incomplete journals of congressional debates. See Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979); Aldridge v. Williams, 3 How. (44 U.S.) 9, 24 (1845); Blitz v. Donovan, 740 F.2d 1241, 1247 (D.C. Cir. 1984); Northern Colo. Water Conservancy Dist. v. Federal Energy Regulatory Comm'n, 730 F.2d 1509, 1518 (D.C. Cir. 1984) (Wright, J.); see also Marc N. Garber & Kurt A. Wimmer, President's Statements at Signings No Help to U.S. Judges, 8 (52) Nat'l L.J. 15, 42 (Sept. 8, 1986). The record here reflects the entire remarks of each legislator and witness, and the Court may divine intent from the proceedings as an integrated whole.
- 8 See Commission Transcript (DX 1) at 23 (Albright: "it isn't the product itself that we're attempting to address here, but rather it's the problems that are caused by a certain type of business"); id. at 48 (Averitt: "we're not deciding today whether people should or should not read, watch, do any of these activities"); id. at 49-50 (Albright: "the content has absolutely nothing to do with it"); id. at 51-52 (Wynne: "compelling government objective [is] controlling the crime associated with the concentration of commercial establishments of this type"); id. at 57-58 (Garrigan: "adverse effect that the business of selling pornography has on the surrounding community"); id. at 58-59 (Letot: "property values, neighborhood blight, crime").
- 9 See Council Transcripts (DX 17) at 6 (Holcomb: "these types of establishments causing crime"); id. at 23-25 (Ragsdale: adult motels "continue to . . . increase the crime"); id. at 25-26 (Richards: "this is part of our anti-crime package"); id. at 26 (Palmer: "clearly, I think that the intent of this ordinance is to reduce crime. It is clearly to reduce urban blight and to reduce the possibility of the deterioration of economic values, both in businesses as well as in residences").

10. This was also the clear intent of the drafter of the ordinance. See Affidavit of Analeslie Muncy (DX 3). Moreover, each of the three studies considered by both the Commission and the Council came to the conclusion that sexually oriented businesses were associated with rising neighborhood crime rates and dropping neighborhood property values. See DX 6 (Austin: appraisers found "negative impact" on property values and police found crime rate at "nearly double" the whole-city rate); DX 7 (Indianapolis: sex-related crime rate is 77 percent higher in adult area, and property appreciated at only one-third to one-half the city rate); DX 11 (Los Angeles, noting increase in crime but not entirely conclusive on property values in all areas). Other studies, both those explicitly relied on by the drafters and those not used, come to similar conclusions. See DX 8 (Houston); DX 9 (Beaumont); DX 10 (Amarillo); DX 12 (Phoenix); DX 13 (Las Vegas); DX 14 (Seattle).

Most importantly, the study performed of a section of Dallas—albeit a small and perhaps not entirely representative section—determined that crime in an area dominated by sexually oriented businesses was 90 percent higher than in the city as a whole. See Study (DX 20); see also Affidavit of Rick Stone (DX 19) (methodology). A similar but more anecdotal study, carried out by the Sheraton-Mockingbird hotel, demonstrated substantial crime in its vicinity arguably generated by the presence of sexually oriented businesses. See Sheraton Study (DX 22); see also Affidavit of J.W. Vandeveer (DX 21).

- 11 There is little doubt that the most vocal supporters of the ordinance - from such groups as the Dallas Association for Decency, the American Renewal Foundation, and the Citizens for Decency Through Law — applauded the ordinance for its incidental impact on speech. Although such witnesses may have had the intent to "zone [sexually oriented businesses] out of existence" by a law that was the "strongest vehicle toward elimination" of sen businesses, see DX 6 at 3 (remarks of Atlanta city attorney that formed basis for finding of improper motive, see Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207 [N.D. Ga. 1981]), the City evinced no such illegal motive. Cf. Weinstein, Regulating Pornography: Recent Legal Trends, Land Use Law, February 1982, at 4. No inquisition into the "true" intentions of the fegislators is warranted here, cf. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 270 (1977), as the operative effect of the law and the statements of the legislators indicate that the purpose of the law was permissible. See Palmer v. Thompson, 403 U.S. 217, 224 (1971), Washington v. Davis, 426 U.S. 229, 243 (1976) (\*operative effect of the law rather than its purpose is the paramount factor").
- 12 Cf. U.S. Department of Justice, Attorney General's Commission on Pornography, Final Report 305 (Washington, D.C.: Government Printing Office, July 1986) (relied upon by defendants). In this connection, the Dallas City Council and Plan Commission could

instruct the Meese Commission on the difference between correlation and causation. The critical inquiry here is whether secondary effects are associated with speech, see Renton v. Playtime Theatres, 106 S. Ct. 925 (1986). The Meese Commission — which performed no original research — ignored decades of scientific evidence to conclude that pornography "causes" crime. But see, e.g., Malamuth & Donnerstein, The Effects of Aggessive-Pornographic Mass Media Stimuli, 15 Advanced and Experimental Social Psychology 103 (1982); Malamuth & Feshbach, Testing the Hypotheses Regarding Rape: Exposure to Sexual Violence, Sex Differences, and the Normality of Rapists, 14 Journal of Research in Personality 121 (1980); Malamuth, Rape Fantasies as a Function of Exposure to Violent Sexual Stimuli, 10 Archives of Sexual Behavior 33 (1981); Commission on Obscenity and Pornography, Report (1970) ("erotic material is [not] a significant cause of sex crime").

There is a concurrent judicial recognition that the tenuous link between pornography and crime is not sufficiently established to form the basis of any sound public policy. See, e.g., Stanley v. Georgia, 394 U.S. 557, 567 (1969) ("given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits"). Indeed, the premier case on pornographic literature pointed out that even the most innocuous—and, indeed, moral—material may lead to violent sex crime:

Heinreich Pommerenke, who was a rapist, abuser, and mass slayer of women in Germany, was prompted to his series of ghastly deeds by Cecil B. Demille's The Ten Commandments. During the scene of the Jewish women dancing about the Golden Calf, all the doubts of his life came clear: women were the source of the world's trouble and it was his mission to both punish them for this and to execute them. Leaving the theater, he slew his first victim in a park nearby. John George Haigh, the British vampire who sucked his victims' blood through soda straws and dissolved their drained bodies in acid baths, first had his murder-inciting dreams and vampire longings from watching the 'voluptuous' procedure of — an Anglican High Church Service!

Memoirs v. Massachusetts, 383 U.S. 413, 432 n.11 (1966) (Douglas, J., concurring), quoting Murphy, The Value of Pornography, 10 Wayne L. Rev. 6655, 668 (1964).

Based on this false and largely discredited causal nexus, the Meese Commission recommends the constitutionally suspect course of eliminating the speech rather than eliminating its secondary effects — the better course, followed here.

13 The Ordinance makes it a defense that "each item of descriptive, printed, film, or video material offered for sale or rental, taken as a whole, contains serious literary, artistic, political, or scientific value." Ordinance at 41A-21(e); see also Roth v. United States, 354 U.S. 476, 489 (1957).

- 14 The "location" restriction also provides that there may not be more than one sexually oriented business "in the same building, structure, or portion thereof." See Ordinance, section 41A-13(c).
- 15 Even if representatives of each of the two absent sexually oriented businesses were present, it would not affect the constitutionality of the Ordinance. There is some question, however, about the vagueness and breadth of the primary business purpose of a sexual encounter center: "activities between male and female persons and/or persons of the same sex when one or more of the persons is in a state of nudity or semi-nude." Ordinance, 41A-2(16)(B). Although defendants broadly assert that "such businesses are not entitled to first amendment protections anyway," Response at 3 n.1, citing Stansberry v. Holmes, 613 F.2d 1285 (5th Cir.), cert. denied, 447 U.S. 929 (1980), the businesses are certainly entitled to fair notice that their conduct is prohibited by statute, see Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1971). As the issue is not squarely presented to the Court, it need not be resolved.
- 16 A sexually oriented business that has been denied licensure because of location restrictions may apply for an exemption under section 41A-14. The application is decided by a permit and license appeal board, with reference to enumerated findings required by the Ordinance. An exemption may only allow operation of a sexually oriented business for 12 months, at which time the business may apply for another exemption. The standards set forth in this section are drawn almost verbatim from Young, 427 U.S. at 54 n.7. If the City improperly denies a request for exemption e.g., by failing to apply the Young standards in section 41A-14 the applicant has recrurse in a state court suit, by showing that the City's denial is not supported by "substantial evidence," see post at 21 n.26.
- 17 A delayed and piecemeal determination of plaintiffs' constitutional claims would not serve the City. As counsel agreed in chambers when this Court set an accelerated schedule for resolving this controversy on cross-motions for summary judgment, a wholesale determination of the Ordinance's validity would permit orderly enforcement of the law and an expedited appeal, and save both the plaintiffs and the City substantial funds alloted in anticipation of protracted litigation. See DX 17 at 27-29.
- 18 See, e.g., Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981); Jenkins v. Georgia, 418 U.S. 153 (1974); Joseph Burstyn, Inc., v. Wilson, 343 U.S. 495 (1952). The City does not allege that the conduct in which plaintiffs engage involves obscenity, which is prohibited by separate statute and which may permissibly be prohibited because it is not protected by the first amendment. See Miller v. California, 413 U.S. 15 (1973) ("obscene material is unprotected by the first amendment"); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); see also New York v. Ferber, 458 U.S. 747, 757 (1982) (child pornography is outside the protections of the first amendment). Nor does the City

advocate the novel - the largely unsupportable - position that pornography is, like obscenity, outside the bounds of the first amendment. Cf. Schauer, Speech and "Speech" - Obscenity and "Obscenity:" An Exercise in the Interpretation of Constitutional Language, 67 Ga. L.J. 899 (1979); Finnis, Reason and Passion: The Constitutional Dialectic of Free Speech and Obscenity, 116 U. Pa. L. Rev. 222 (1967); Attorney General's Commission on Pornography, ante at 6 n.12, at 260-262 (section entitled "Is the Supreme Court Right," claiming that "the bulk of scholerly commentary is of the opinion that the Supreme Court's resolution of and basic approach to the first amendment issues is incorrect"), citing Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum. L. Rev. 391 (1963). See also Memoirs v. Massachusetts, 383 U.S. 413, 453 (1966) (Clark, J., dissenting) (justifying controlling "erotic and pornographic n.aterial" by reference to obscenity's status as non-first-amendment material), citing Hoover, Combating Merchants of Filth: The Role of the FBI, 25 U. Pitt. L. Rev. 469 (1964). Hoover, The Fight Against Filth, The American Legion Magazine (May 1961).

- 19 Time, place, and manner restrictions are permissible if they are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels for communication. See Clark v. Community for Creative Mon-Violence, 466 U.S. 789, 807 (1984); City Council v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984); Heffron v. International Society for Krishna Consciousness, 452 US. 640, 648 (1981). But see Renton at 4164 (Brennan, J., dissenting) (zoning adult businesses necessarily content-based).
- 20 Indeed, the three governmental interests sought to be advanced by the Ordinance are at the very heart of the rationale for allowing local governments the power to zone:

It [is] undeniable that zoning, when used to preserve the character of specific areas of a city, is perhaps "the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult concept of quality of life."

Young, 427 U.S. at 80 (Powell, J., concurring) quoting Village of Belle Terre v. Boraas, 416 U.S. at 13; see also ante at 1 n.1.

21 The unanimity of permissible intent here far surpasses that upheld by the Supreme Court in passage of the Renton ordinance; the combination of legislative study and intent demonstrated here might even satisfy the standards of stices Brennan and Marshall in dissent. Although the impetus in his result may be the particular type of content conveyed by such the inesses, the government may permissibly tailor its reaction to differ the messages according to the degree to which its interest are implicated. See Young, 427 U.S. at 82 n.6 (Powell, J., concurring), citing Tinker v. Des Moines School Dist., 393 U.S. 503, 509-11 (1969); Procunier v. Martinez, 416 U.S. 396, 413-14 (1974); Greer v. Spock, 424 U.S. 828, 842-44 (1976) (Powell, J., concurring).

- 22 In Renton, the Court held that it was clearly erroneous for the circuit court to find the ordinance invalid because "practically none" of the available land was currently for sale or lease, and because there were no "commercially viable" locations left open by the ordinance. See City of Renton v. Playtime Theatres, Inc., 748 F.2d 527, 534 (9th Cir. 1985); Renton, 54 U.S.L.W. at 4163. Rather than reviewing in detail the choices availai to regulated businesses under the ordinance, the Court stated that "the first amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theatre within the city." Renton, 54 U.S.L.W. at 4163. The first amendment, the Court said, does not require that "speech-related businesses... obtain sites at bargain prices," id., but only that a city "make some areas available" for such businesses, id. at 4164.
- 23 Plaintiffs' exhibits 3, 4, and 5, and the Street Affidavit (Sept. 10, 1986), command no contrary result. These affidavits seek to establish that the areas left open by the Ordinance are undesirable as a matter of business judgment by those involved in sexually oriented businesses, but it is clear that Renton disavowed reliance on precisely such information. See Renton, 54 U.S.L.W. at 4163-64.
- 24 Plaintiffs' exhibits 7.1, 7.2, 7.3, 7.4, 7.5, 7.6, Affidavits of Bill Staten, Tracey Robertson, Beverly K. Van Dusen, Paul Radnitz, Bruce Wayne Logan, Gayla Marilynn Wolf, J.R. Estes, William C. Evert, Jr., Charles E. Carlock, and Plaintiffs' Statement of Impact all seek to establish that the period is invalid because of plaintiffs' pre-existing debts. Although the Ordinance will harm plantiffs' profitability, the period is reasonable under accepted principles. See City of University Park v. Benners, 485 S.W.2d 773, 777-78 (Tex. 1972); Zahn v. City of Los Angeles, 274 U.S. 325 (1927) (economic detriment to regulated industries permissible); Ascarate v. Villalobos, 148 Tex. 254, 223 S.W.2d 945, 950 (1949) (same). This is not a case where structures must be demolished to accomplish the state's reasonable exercise of police power, cf. Lubbock Post Co., 569 S.W.2d at 940; if it is not profitable for plaintiffs to relocate, the Ordinance does not prohibit them from using their established structures for other enterprises.
- 25 Equally valid is the section's provision for an exemption from location restrictions. Even if there were a constitutional entitlement to waiver provisions in an amortization period which is doubtful, see Northend Cinema, 585 P.2d at 1159 the exemption utilized in this section is that upheld by the Supreme Court in Young, 427 U.S. at 56 (noting that court below rejected vagueness challenge to waiver provisions). Plaintiffs' argument that this section, like the licensure section, vests unbridled discretion in the Police Chief will be dealt with below, see post at 20-21.

Moreover, the section of the Ordinance prohibiting more than one sexually oriented business from locating in the same building—section 41A-13(c)—is constitutional. See Hart Bookstores v.

Edmisten, 612 F.2d 821 (4th Cir. 1979). As the City admitted at oral argument, it interprets the Ordinance to permit one business to deal in several different media; if the City reneges on this interpretation, it would be a simple matter for an applicant to claim in state court, see Memet v. State, 642 S.W.2d 518, 524 (Tex.Civ.App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.), that the City is now estopped from changing the interpretation on which this Court based a finding of constitutionality. See Hicks v. Harris, 606 F.2d 65 (5th Cir. 1979) (government may be estopped by official with authority).

- 26 Licensing, as plaintiffs concede, is a valid method of ensuring that regulated businesses abide by locational and other restrictions. See Genusa v. City of Peoria, 619 F.2d 1203, 1212-13 (7th Cir. 1980); see also Wall Distributors, Inc., v. City of Newport News, 782 F.2d 1165, 1171 (4th Cir. 1986); SDJ, Inc. v. City of Houston, 636 F. Supp. at 1368 (S.D. Tex. 1986); Schope v. State, 647 S.W.2d 675 (Tex. Civ. App.—Houston [14th Dist.] 1982). Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), cert. denied, 450 U.S. 919 (1981), holds nothing to the contrary; that court found a specific intent to suppress speech. See id. at 504.
- 27 See Genusa, 619 F.2d at 1213 (\$100); Bayside Enterprises v. Carson, 470 F. Supp. 1140, 1148-49 (M.D. Fla. 1979) (\$400); Borrago v. City of Louisville, 456 F. Supp. 30 (W.D. Ky. 1978) (\$250); Airport Book Store v. Jackson, 248 S.E.2d 623 (Ga. 1978) (\$500). The license fee challenged here is valid; it is not excessive in view of the substantial administrative costs to be defrayed in the implementation of the Ordinance, see Cax v. New Hampshire, 312 U.S. 569 (1941), and is rationally related to the permissible purposes of the Ordinance. It is not, then, a tax levied on an expressive enterprise in violation of the first amendment. Cf. Fernandes v. Limmer, 663 F.2d 619, 632-33 (5th Cir. 1982), cert. dismissed, 458 U.S. 1124 (1982); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581 (1983) ("it is beyond dispute that the states and the federal government can subject newspapers to generally applicable economic regulations without creating constitutional problems").
- 28 The constitutional infirmities identified could also be changed by amendment without significantly altering the Ordinance's purpose in light of the City's objectives.
- 29 This infirmity here is not repeated in the similar language of section 41A-9(5). That section allows a license to be suspended if a licensee has demonstrated an inability to operate a business "in a peaceful and law-abiding manner thus necessitating action by law enforcement officers." This section is thus limited by its language to certain objective indications of an inability to operate a business peacefully.

- 30 Indeed, some may find the concept of "peaceful" operation of a sexually oriented business to constitute an oxymoron, in light of recent challenges claiming that pornography is invariably violent to women. See American Booksellers Ass'n, Inc. v. Hudnut, 54 U.S.L.W. 2143 (7th Cir. 1985) (rejecting Minneapolis ordinance as "thought control"); Callahan, Women and Pornography, American Film, March 1982, at 63. Although this view has been invalidated, there is little in the Ordinance to keep similar subjective views from being grounds for license denial (would operating business catering to sadists or masochists, for example, be "peaceful"?).
- 31 The infirmity could easily be cured by amendment. Section 41A-5(a)(S) could be limited to arrest or police action, as is section 41A-9(5); section 41A-5(c) could be limited to the same elapsed-time standard of section 41A-5(B).
- 32 This subsection is not invalidated by Doe v. City of Buffalo, 56 N.Y.2d 926, 453 N.Y.S.2d 605, 439 N.E.2d 321 (1982). The language before the New York Court of Appeals provided that "such other information" as the licensing authority might require must be provided. Here, however, the further information that may permissibly be required of an applicant is limited to that "reasonably necessary for issuance of the license." It is thus limited to information the police chief may need to determine whether an applicant is in compliance with other provisions of the Ordinance, and does not confer "openended discretionary power." Doe, 56 N.Y.2d at \_\_\_\_\_\_, 453 N.Y.S.2d at 606, 439 N.E.2d at \_\_\_\_\_\_,
- 33 This provision is apparently meant to prevent rejected applicants from skirting the intent of the law by simply recruiting housemates, see Fischer v. Dallas Federal Savings & Loan Ass'n, CA3-79-565-R, slip op. at 7 n.5 (N.D. Tex, June 18, 1985) (there's nothing I wouldn't de I if you would be my POSSLQ"), to become "licensees" on behalf of the disappointed applicant. It is thus permissible; although a freedom-of-association challenge could be mounted to the subsection, its success would be most doubtful after Lyng v. Castillo, 54 U.S.L.W. 4864 (U.S. June 27, 1986) (Stevens, J.) (statutory classification based on living arrangement upheld). Indeed, the language of which plaintiffs complain was taken from two other ordinances that have been applied to plaintiffs for years: the thester ordinance, section 46-4(a)(7), and the dance-hall ordinance, section 14-3.
- 34 This principle was squarely addressed in Arcara v. Cloud Books, Inc., 54 U.S.L.W. 5060 (U.S. July 7, 1986) (Burger, C.J.), in which the Court held that a sexually related business could be closed when management was aware of sexual behavior on the premises, in violation of law. See id. at 5062. If violation of law by a licensee may permissibly justify closure, it follows inescapably that one who has been convicted of a sex-related crime may be denied licensure. Accord, 106 Forsyth Corp. v. Bishop, 482 F.2d 280, 281 (5th Cir. 1973), cert. denied, 422 U.S. 1044 (1975); Borrago v. City of Louisville, 456 F. Supp. 30, 32 (W.D. Ky. 1978); Airport Bookstore, Inc. v. Jackson,

248 S.E.2d 623 (Ga. 1978), cert. denied sub nom. Gateway Books v. Jackson, 441 U.S. 952 (1979). One intent of the law was to prevent crime; the Ordinance considers only certain crimes to be relevant—such as prostitution, obscenity, or child pornography, see Ordinance at 41A-5(a)(10)(a). It allows even those convicted of such offenses to be licensed after a certain amount of time has elapsed, see id. at 41A-5(a)(10)(B). It is thus narrowly tailored to avoid licensure of those who have recently shown a predilection toward the criminal conduct the Ordinance was designed to overcome.

- 35 The operation of these subsections against the plaintiffs present in this case demonstrates that the effect they would have upon applicants is quite real. Gayla Marilynn Wolf, an owner of a video concern, has been convicted of robbery, see Wolf Affidavit at 3; and William C. Evert, Jr., an owner of a bookstore, has been convicted of a controlled substances act violation, see Evert Statement at 5.
- 36 Denial of licensure on the basis of investigation into a crime constitutes punishment without the requisite finding of guilt. "Our system of justice reserves punishment to those who have been convicted beyond a reasonable doubt of an offense; collateral punishment without process has no place in our constitutional scheme." Parks v. Rogers, CA3-85-1411-R, slip op. at 3 (N.D. Tex. 1986); see also Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972) (grand jury serves "as a protector of citizens against arbitrary and oppressive governmental action").
- 37 This aspect of the Ordinance is not a content-neutral time, place, and manner restriction on protected speech; denial of a license amounts to an absolute suppression of expression. "In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the first amendment without bearing the burden of shoving that its restriction is justified." Philadelphia Newspapers v. Hepps, 106 S. Ct. 1558, 1564 (1986). Cf. Smith v. Cal fornia, 361 U.S. 147 (1959) (procedural rules ordinarily valid may be barred because of the threat to first amendment rights). Surely this burden cannot be carried by a bare statement of probable cause.
- 38 See Broadrick v. Oklahoma, 413 U.S. 601 (1973). A legitimate theatre that occasionally exhibits explicit, non-obscene films but is not a "sexually oriented business," such as various repertory theatres in Dallas, would be forced to curtail such exhibitions in fear that a film that is subject to mere indictment as obscenity would jeopardize a pending license application regardless of an ultimate non-obscenity finding.
- 39 The threat this subsection poses to applicants is palpable. Two plaintiffs here would be foreclosed by its terms Beverly D. Van Dusen, owner of two bookstores, has been charged with obscenity violations, and the matter is set for trial, see Van Dusen Affidavit at 2; Bruce Wayne Logan, owner of Eros. Dallas, has been awaiting trial for two years on a promotion of prostitution charge, see Logan Affidavit at 2.

- 40 Section 41A-5(b), which states that appeal of a conviction shall have no effect on a disqualification, is not subject to a parallel infirmity; such provisions are routinely upheld, as they deny an applicant against whom a finding of guilt has been made. See State Bar Act, section 16(e), 1A Tex. Rev. Civ. Stat. art. 320a-1 (when attorney is convicted of felony involving moral turpitude or of misdemeanor involving theft, embezzlement, or fraudulent appropriation, the district court "shall enter an order suspending the attorney from the practice of law during the pendency of any appeals from the conviction"); see also Bailey v. State, 575 S.W.2d 418 (Tex.Civ.App.—Ft. Worth 1978, writ refd n.r.e.); cf. McInnis v. State, 618 S.W.2d 389 (Tex.Civ.App.—Beaumont 1981, writ refd n.r.e.), cert. denied, 456 U.S. 976 (1982).
- 41 This holding does not embrace the definition given to sexual encounter centers, as no such business is present. See ante at 10 n.15.
- 42 Requiring a vendor of books dealing in "specified sexual activities" to have the sale of such materials as "one of its principal business purposes" is the sole bar to a finding that, for instance, the Government Printing Office Bookstore is a "sexually oriented business" due to its pandering of the Meese Commission report, ante at 6-7 n.12 — a work that is explicit in its description of activities 41A-2(19)(A), (B), (C), and (D). See, e.g., the 155 pages of graphic descriptions of pornographic paperback books, peep shows, tabloids, films, and videos — including complete and very explicit summaries of Deep Throat, The Devil in Miss Jones, and Debbie Does Dallas - bravely written, after his prolonged study of and exposure to this relentless and unmitigated sleaze, by the redoubtable Senior Investigator Haggerty. Id. at 1647-1802. Although the Meese Commission concluded that sustained "viewing [of such] nonviolent, sexually explicit material . . . is statistically related to a higher probability of sexual crimes, id. at 172, we are merely left to wonder about the fate of Senior Investigator Haggerty and his tragic battle against these statistical probabilities.
- 43 Plaintiffs make the general objection that the Ordinance cannot be directed to adult cabarets at all, claiming that a "paucity" of evidence concerning such establishments was considered by the City. This is incorrect, as both major studies considered those from Austin and Indianapolis concerned topless bars. Moreover, any consideration of the Ordinance and the discussion surrounding it, as a whole, reveals that the City did indeed consider topless bars part of the condition the Ordinance seeks to ameliorate; the City may permissibly include adult cabarets in the Ordinance.
- 44 A major internal restriction that plaintiffs saw as an egregious intrusion upon the working of their businesses the interpretation of the Ordinance that only one "type" of sexually oriented business may be located in one building is, in fact, nonexistent. The City admitted at oral argument that the Ordinance does not operate to

restrict several media being dealt with by one sexually oriented business; thus, those plaintiffs that have, for example, an adult arcade plus a book and video store may continue to operate in that manner (albeit in a new location if they must relocate under the location restrictions).

45 Bowers determined that the state could prohibit certain sexual practices because "prohibitions against [such] conduct have ancient roots," Bowers, 54 U.S.L.W. at 4921, in "Judaeo-Christian moral and ethical standards," id. at 4922 (Burger, C.J., concurring). Based on the arguments before it, this Court need not inquire into whether other "prohibitions" that have "ancient roots" also require granting broad powers to states wishing to return to such time-honored values—such as, for example, the value that women may be treated as chattels.

Such a view certainly has "ancient roots." Indeed, the venerable Blackstone noted that at Roman law, a creditor might sell a debtor's wife into slavery to redeem his debts - and that in East India, a creditor is entitled to "violate with impunity the chastity of the debtor's wife." 2 Blackstone's Commentaries 472-73 (1778). The "Judaeo-Christian" roots of such a view are, likewise, well-established. See The Bible (1 Timothy 2:12) ("I suffer not a woman to teach, nor to usurp authority over the man, but to be in silence"); The Koran, ch. 4 ("men have authority over women because Aliah has made the one superior to the other . . . for those from whom you fear disobedience, admonish them and send them to beds apart and beat them"; J. Knox, The First Blast of the Trumpet Against the Monstrous Regiment of Women (1558) "to promote a woman to bear rule . . . is repugnant to nature, contumely to God"). This view was shared by those respected in law; Aristotle found that "woman may be said to be an inferior man," and Lord Chesterfield described women as "children of a larger growth."

The law was persistent in defining the domain in which woman could permissibly be present. Myra Bradwell discovered this fact at the hands of the Supreme Court, when it held that Illinois could permissibly prohibit her from practicing law. See Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) ("the paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator"); see also Muller v. Oregon, 208 U.S. 412, 421 (1908) (a "woman's physical structure [places] her at a disadvantage in the struggle for subsistence"). The law told her not only where she could not be, then, but where she should be. See Tuter v. Tuter. 120 S.W.2d 203, 205 (Mo. Ct. App. 1938) ("there is but a twilight zone between a mother's love and the atmosphere of heaven, and ... no child should be deprived of that maternal influence"); Jenkins v. Jenkins, 173 Wis. 595, 184 N.W. 826, 827 (1921) (\*nothing can be an adequate substitute for motherly love"). The attitudes have been persistent. See Hall v. Small Business Admin., 695 F.2d 175, 178 (5th Cir. 1983) ("I don't think any female law clerk is going to give me a lot of input on how to decide a case"); see also Martin, Fathers and Families: Expanding the Familial Rights of Men, 36 Syracuse L. Rev. 1265, 1267 (1986). However, the "outer limits" of Hardwick — like those of the right of privacy itself, see Baker v. Wade, 553 F. Supp. 1121, 1135 (N.D. Tex. 1982) — have not yet been established, so it is too early to tell if centuries-long, western culture objections to rights now held (or sought) by females and others will receive the same analysis and treatment as the right of privacy claims by the homosexual plaintiff in Hardwick. See Hardwick, 54 U.S.L.W. at 4926 nn.4, 5 (Blackmun, J., dissenting) (heterosexual sexual conduct, racial prejudice).

- The first reported obscenity case at common law, Le Roy v. Sir Charles Sidney, 1 Sid. 168, pl. 29 (K.B. 1663), involved Sir Charles, a nude and profane nobleman on a London balcony who spewed an "offensive liquor" upon a crowd "the proximate source of the 'offensive liquor' appears to have been Sir Charles." Memoirs, 383 U.S. at 428 n.4. Another early case resulted in a finding that the tract "Venus in the Cloister or the Nun in Her Smock" placed the general morality in jeopardy. See Dominus Rex v. Curl, 2 Strange 288, 93 Eng. Rep. 849 (K.B. 1727). Early transplants of the doctrine to this country involved those intending to "deprave and corrupt those whose minds are open to such immoral influence and into whose hands a publication of this sort may fall." R.V. Hicklin, L.R. 3 Q.B. 360 (1868); see also Ex Parte Jackson, 96 U.S. 727 (1878).
- 47 See, e.g., Milton, Areopagitica: A Speech for the Liberty of Unlicensed Printing 24 (1644); Locke, A Letter Concerning Toleration (1689); Bentham, Fragment on Government (1776); Mill, On Liberty (1859).
- 48 See Community Television of Utah, Inc. v. Roy, 555 F. Supp. 1164 (1982); Trauth & Huffman, Obscenity and Cable Television: A Regulatory Approach (1986).
- 49 See, unfortunately, Baker v. Wade, 769 F.2d 289 (5th Cir. 1985) (en banc), cert. denied, 54 U.S.L.W. 3863 (U.S. July 7, 1986) (morality justifies prohibiting consensual sodomy); Bowers v. Hardwick, 54 U.S.L.W. 4919 (U.S. June 30, 1986) (same). Accord, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (morality justifies limiting expression); Devlin, The Enforcement of Morals (1979) (moral consensus requisite to societal survival).

# APPENDIX G

#### **ORDINANCE NO. 19196**

An ordinance amending the Dallas City Code, As amended, by adding CHAPTER 41, "SEXUALLY ORI-ENTED BUSINESSES" to be comprised of Sections 41-1 through 41-23; repealing Sections 31-24 and 31-26 of the Dallas City Code; providing definitions; providing for licensing and regulation of sexually oriented businesses; regulating the location of sexually oriented businesses; providing for enforcement; providing a penalty not to exceed \$1000 for certain offenses, and designating certain other offenses as class B misdemeanors; providing a severability clause; and providing an effective date.

WHEREAS, the city council makes the following findings with regard to sexually oriented establishments:

- (1) Article 1175, Section 23, of the Revised Civil Statutes of Texas authorizes home rule cities to license any lawful business, occupation, or calling that is susceptible to the control of the police power.
- (2) Article 1175, Section 34, of the Revised Civil Statutes of Texas authorizes home rule cities to enforce all ordinances necessary to protect health, life, and property, and to preserve the good government, order and security of such cities and their inhabitants.
- (3) There are a substantial number of sexually oriented businesses in the city that require special supervision from the public safety agencies of the city in order to protect and perserve the health, safety, and welfare of the patrons of such businesses [sic] as well as the citizens of the city.
- (4) The city council finds that sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature.

- (5) The city council further finds that the city police have made a substantial number of arrests for sexually related crimes in sexually oriented business establishments.
- (6) The concern over sexually transmitted diseases is a legitimate health concern of the city which demands reasonable regulation of sexually oriented businesses in order to protect the health and well-being of the citizens.
- (7) Licensing is a legitimate and reasonable means of accountability to ensure that operators of sexually oriented businesses comply with reasonable regulations and to ensure that operators do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation.
- (8) There is convincing documented evidence that sexually oriented businesses, because of their very nature, have a deleterious effect of both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values.
- (9) It is recognized that sexually oriented businesses, due to their nature have serious objectionable operational characteristics particularly when they are located in close proximity to each other, thereby contributing to urban blight and downgrading the quality of life in the adjacent areas.
- (10) The city council desires to minimize and control these adverse effects and thereby preserve the property values and character of surrounding neighborhoods, deter the spread of urban blight, protect the citizens from increased crime, preserve the quality of life, and protect the health, safety, and welfare of the citizenry; and

WHEREAS, the city council makes the following findings with regard to the licensing of sexually oriented business establishments:

- (1) The city council believes it is in the interest of the public safety and welfare to prohibit persons convicted of certain crimes from engaging in the occupation of operation a sexually oriented business.
- (2) The city council, in accordance with Article 6252-13c of Vernon's Texas Civil Statutes, has considered the following criteria:
  - (a) the nature and seriousness of the crimes;
- (b) the relationship of the crimes to the purposes for requiring a license to engage in the occupation;
- (c) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved;
- (d) the relationship of the crimes to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of the licensed occupation; and has determined that the crimes listed in Sections 41-5(a) (10) of Chapter 41, "SEXUALLY ORIENTED BUSI-NESSES," of the Dallas City Code, as set forth in this ordinance, are serious crimes which are directly related to the duties and responsibilities of the occupation of operating a sexually oriented business. The city council has further determined that the very nature of the occupation of operating a sexually oriented business brings a person into constant contact with persons interested in sexually oriented materials and activities thereby giving the person repeated opportunities to commit offenses against public order and decency or crimes against the public health,

safety, or morals should he be so inclined. Thus, it is the opinion of the city council that the listed crimes render a person unable, incompetent, and unfit to perform the duties and responsibilities accompanying the operation of a sexually oriented business in a manner that would promote the public safety and trust.

- (3) The city council has determined that no person who has been convicted of a crime listed in Section 41-5(a) (10), as set forth in this ordinance, is presently fit to operate a sexually oriented business until the respective time periods designated in that section have expired.
- (4) It is the intent of the city council to disqualify a person from being issued a sexually oriented business license by the city of Dallas if he is currently under indictment or misdemeanor information for, or has been convicted within the designated time period of, any of the crimes listed in Section 41-5(a)(10), as set forth in this ordinance; NOW, THEREFORE,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That the Dallas City Code, as amended, is amended by adding CHAPTER 41, "SEXUALLY ORI-ENTED BUSINESSES," to read as follows:

# "CHAPTER 41. SEXUALLY ORIENTED BUSINESSES SEC. 41-1. PURPOSE AND INTENT.

(a) It is the purpose of this chapter to regulate sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this chapter have neither the purpose nor effect of imposing a limitation of restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market.

(b) It is the intent of the city council that the locational regulations of Section 41-13 of this chapter are promulgated pursuant to Article 2372w, Revised Civil Statutes of Texas, as they apply to nude model studios and sexual encounter centers only. It is the intent of the city council that all other provisions of this chapter are promulgated pursuant to the Dallas City Charter and Article 1175, Revised Civil Statutes of Texas.

#### SEC 41-2. DEFINITIONS.

In this chapter:

- (1) ADULT ARCADE means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing of "specified sexual activities" or "specified anatomical areas."
- (2) ADULT BOOKSTORE or ADULT VIDEO STORE means a commercial establishment which as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following:

- (A) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which depict or describe "specified sexual activities" or "specified anatomical areas"; or
- (B) instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activies."
- (3) ADULT CABARET means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:
  - (A) persons who appear in a state of nudity; or
- (B) live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or
- (C) films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" of "specified anatomical areas."
- (4) ADULT MOTEL means a hotel, motel or similar commercial establishment which:
- (A) offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; and has a sign visible form the public right of way which advertises the availability of this adult type of photographic reproductions; or

- (B) offers a sleeping room for rent for a period of time that is less than 10 hours; or
- (C) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than 10 hours.
- (5) ADULT MOTION PICTURE THEATER means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."
- (6) ADULT THEATER means a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities."
- (7) CHIEF OF POLICE means the chief of police of the city of Dallas or his designated agent.
- (8) ESCORT means a person who, for consideration, agrees or offers to act as a companion, guide, or date for another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.
- (9) ESCORT AGENCY means a person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes, for a fee, tip, or other consideration.
- (10) ESTABLISHMENT means and includes any of the following:
- (A) the opening or commencement of any sexually oriented business as a new business;

- (B) the conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business; or
- (D) [sic] the relocation of any sexually oriented business.
- (11) LICENSEE means a person in whose name a license to operate a sexually oriented business has been issued, as well as the individual listed as an applicant on the application for a license.
- (12) NUDE MODEL STUDIO means any place where a person who appears in a state of nudity or displays "specified anatomical areas" is provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration.
- (13) NUDITY or a STATE OF NUDITY means the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast.
- (14) PERSON means an individual, proprietorship, partnership, corporation, association, or other legal entity.
- (15) SEMI-NUDE means a state of dress in which clothing covers no more than the genitals, public region, and areolae of the female breast, as well as portions of the body covered by supporting straps or devices.
- (16) SEXUAL ENCOUNTER CENTER means a business or commercial enterprise that, as one of its primary business purposes, offers for any form of consideration:
- (A) physical contact in the form of wrestling or tumbling between persons of the opposite sex; or

- (B) activities between male and female persons and/or persons of the same sex when one or more of the persons is in a state of nudity or semi-nude.
- (17) SEXUALLY ORIENTED BUSINESS means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, escort agency, nude model studio, or sexual encounter center.
- (18) SPECIFIED ANATOMICAL AREAS means human genitals in a state of sexual arousal.
- (19) SPECIFIED SEXUAL ACTIVITIES means and includes any of the following:
- (A) the fondling of other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;
- (B) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;
  - (C) masturbation, actual or simulated; cr
- (D) excretory functions as part of or in connection with any of the activities set forth in (A) through (C) above.
- (20) SUBSTANTIAL ENLARGEMENT of a sexually oriented business means the increase in floor area occupied by the business by more than 25 percent, as the floor area exists on June 18, 1986.
- (21) TRANSFER OF OWNERSHIP OR CONTROL of a sexually oriented business means and includes any of the following:
  - (A) the sale, lease, or sublease of the business;

- (B) the transfer of securities which constitute a controlling interest in the business, whether by sale, exchange, or similar means; or
- (C) the establishment of a trust, gift, or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control.

#### SEC. 41-3. CLASSIFICATION.

Sexually oriented businesses are classified as follows:

- (1) adult arcades;
- (2) adult bookstores or adult video stores;
- (3) adult cabarets;
- (4) adult motels;
- (5) adult motion picture theaters;
- (6) adult theaters:
- (7) escort agencies;
- (8) nude model studios; and
- (9) sexual encounter centers.

# SEC. 41-4. LICENSE REQUIRED.

- (a) A person commits an offense if he operates a sexually oriented business without a valid license, issued by the city for the particular type of business.
- (b) An application for a license must be made on a form provided by the chief of police. The application must be accompanied by a sketch or diagram showing the configuration of the premises, including a statement of total floor

space occupied by the business. The sketch or diagram need not be professionally prepared but must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six inches. Applicants who must comply with Section 41-19 of this chapter shall submit a diagram meeting the requirements of Section 41-19.

- (c) The applicant must be qualified according the provisions of this chapter and the premises must be inspected and found to be in compliance with the law by the health department, fire department, and building official.
- (d) If a person who wishes to operate a sexually oriented business is an individual, he must sign the application for a license as applicant. If a person who wishes to operate a sexually oriented business is other than an individual, each individual who has a 20 percent or greater interest in the business must sign the application for a license as applicant. Each applicant must be qualified under Section 41-5 and each applicant shall be considered a licensee if a license is granted.
- (e) The fact that a person possesses a valid theater license, dance hall license, or public house of amusement license does not exempt him from the requirement of obtaining a sexually oriented business license. A person who operates a sexually oriented business and possesses a theater license, public house of amusement license or dance hall license shall comply with the requirements and provisions of this chapter as well as the requirements and provisions of Chapter 46 and Chapter 14 of this code when applicable.

#### SEC. 41-5. ISSUANCE OF LICENSE.

- (a) The chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:
  - (1) An applicant is under 18 years of age.
- (2) An applicant or an applicant's spouse is overdue in his payment to the city of taxes, fees, fines, or penalties assessed against him or imposed upon him in relation to a sexually oriented business.
- (3) An applicant has failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form.
- (4) An applicant or an applicant's spouse has been convicted of a violation of a provision of this chapter, other than the offense of operating a sexually oriented business without a license, within two years immediately preceding the application. The fact that a conviction is being appealed shall have no effect.
- (5) An applicant is residing with a person who has been denied a license by the city to operate a sexually oriented business within the preceding 12 months, or residing with a person whose license to operate a sexually oriented business has been revoked within the preceding 12 months.
- (6) The premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances.
- (7) The license fee required by this chapter has not been paid.

- (8) An applicant has been employed in a sexually oriented business in a managerial capacity within the preceding 12 months and has demonstrated that he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner.
- (9) An applicant or the proposed establishment is in violation of or is not in compliance with Section 41-7, 41-12, 41-13, 41-15, 41-16, 41-17, 41-18, 41-19 or 41-20.
- (10) An applicant or an applicant's spouse has been convicted of or is under indictment or misdemeanor information for a crime:

# (A) involving:

- (i) any of the following offenses as described in Chapter 43 of the Texas Penal Code:
  - (aa) prostitution;
  - (bb) promotion of prostitution;
  - cc) aggravated promotion of prostitution;
  - (dd) compelling prostitution;
  - (ee) obscenity;
- (ff) sale, distribution, or display of harmful material to minor;
  - (gg) sexual performance by a child;
  - (hh) possession of child pornography;
- (ii) any of the following offenses as described in Chapter 21 of the Texas Penal Code:
  - (aa) public lewdness;
  - (bb) indecent exposure;
  - (cc) indecency with a child,

- (iii) engaging in organized criminal activity as described in Chapter 71 of the Texas Penal Code;
- (iv) sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;
- (v) incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code;
- (vi) kidnapping or aggravated kidnapping as described in Chapter 20 of the Texas Penal Code;
- (vii) robbery or aggravated robbery as described in Chapter 29 of the Texas Penal Code;
- (viii) bribery or retaliation as described in Chapter 36 of the Texas Penal Code;
- (ix) a violation of the Texas Controlled Substances Act or Dangerous Drugs Act punishable as a felony, Class A misdemeanor, or Class B misdemeanor; or
- (x) criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;

# (B) for which:

- (i) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;
- (ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or
- (iii) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later

date, if the convictions are of two or more misdemeanor offenses or combination of misdemeanor offenses occurring within any 24-month period.

- (b) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or applicant's spouse.
- (c) An applicant who has been convicted or whose spouse has been convicted of an offense listed in Subsection (a)(10), for which the required time period has elapsed since the date of conviction or the date of release from confinement imposed for the conviction, may qualify for a sexually oriented business license only if the chief of police determines that the applicant or applicant's spouse is presently fit to operate a sexually oriented business. In determining present fitness under this section, the chief of police shall consider the following factors concerning the applicant or applicant's spouse, whichever had the criminal conviction:
- (1) the extent and nature of his past criminal activity;
- (2) his age at the time of the commission of the crime:
- (3) the amount of time that has elapsed since his last criminal activity;
- (4) his conduct and work activity prior to and following the criminal activity;
- (5) evidence of his rehabilitation or rehabilitative effort while incarcerated or following release; and

- (6) other evidence of his present fitness, including letters of recommendation from prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for him; the sheriff and chief of police in the community where he resides; and any other persons in contact with him.
- (d) It is the responsibility of the applicant, to the extent possible, to secure and provide to the chief of police the evidence required to determine present fitness under Subsection (c) of this section.
- (e) The license, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, and the address of the sexually oriented business. The license shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time.

#### SEC. 41-6. FEES.

- (a) The annual fee for a sexually oriented business license is \$500.
- (b) If an applicant is required by this code to also obtain a dance hall license or public house of amusement license for the business at a single location, payment of the fee for the sexually oriented business license exempts the applicant from payment of the fees for the dance hall or public house of amusement licenses.

# SEC. 41-7. INSPECTION.

(a) An applicant or licensee shall permit representatives of the police department, health department, fire department, housing and neighborhood services department, and building inspection division to inspect the premises of a sexually oriented business for the purpose of insuring compliance with the law, at any time it is occupied or open for business.

(b) A person who operates a sexually oriented business or his agent or employee commits an offense if he refuses to permit a lawful inspection of the premises by a representative of the police department at any time it is occupied or open for business.

#### SEC. 41-8. EXPIRATION OF LICENSE.

- (a) Each license shall expire one year from the date of issuance and may be renewed only by making application as provided in Section 41-4. Application for renewal should be made at least 30 days before the expiration date, and when made less than 30 days before the expiration date, the expiration of the license will not be affected.
- (b) When the chief of police denies renewal of a license, the applicant shall not be issued a license for one year from the date of denial. If, subsequent to denial, the chief of police finds that the basis for denial of the renewal license has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date denial became final.

# SEC. 41-9. SUSPENSION.

The chief of police shall suspend a license for a period not to exceed 30 days if he determines that a licensee or an employee of a licensee has:

- (1) violated or is not in compliance with Section 41-7, 41-12, 41-13, 41-15, 41-16, 41-17, 41-18, 41-19, or 41-20 of this chapter;
- (2) engaged in excessive use of alcoholic beverages while on the sexually oriented business premises;

- (3) refused to allow an inspection of the sexually oriented business premises as authorized by this chapter;
- (4) knowingly permitted gambling by any person on the sexually oriented business premises;
- (5) demonstrated inability to operate or manage a sexually oriented business in a peaceful and law-abiding manner thus necessitating action by law enforcement officers.

#### SEC. 41-10. REVOCATION.

- (a) The chief of police shall revoke a license if a cause of suspension in Section 41-9 occurs and the license has been suspended within the preceding 12 months.
- (b) The chief of police shall revoke a license if he determines that:
- a licensee gave false or misleading information in the material submitted to the chief of police during the application process;
- (2) a licensee or an employee has knowingly allowed possession, use, or sale of controlled substances on the premises;
- (3) a licensee or an employee has knowingly allowed prostitution on the premises;
- (4) a licensee or an employee knowingly operated the sexually oriented business during a period of time when the licensee's license was suspended;
- (5) a licensee has been convicted of an offense listed in Section 41-5(a)(10)(A) for which the time period required in Section 41-5(a)(10)(B) has not elapsed;

- (6) on two or more occasions within a 12-month period, a person or persons committed an offense occurring in or on the licensed premises of a crime listed in Section 41-5(a)(10)(A), for which a conviction has been obtained, and the person or persons were employees of the sexually oriented business at the time the offenses were committed;
- (7) a licensee or an employee has knowingly allowed any act of sexual intercourse, sodomy, oral copulation, masturbation, or sexual contact to occur in or on the licensed premises. The term "sexual contact" shall have the same meaning as it is defined in Section 21.01, Texas Penal Code; or
- (8) a licensee is delinquent in payment to the city for hotel occupancy taxes, ad valorem taxes, or sales taxes related to the sexually oriented business.
- (c) The fact that a conviction is being appealed shall have no effect on the revocation of the license.
- (d) Subsection (b)(7) does not apply to adult motels as a ground for revoking the license.
- (e) When the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a sexually oriented business license for one year from the date revocation became effective. If, subsequent to revocation, the chief of police finds that the basis for the revocation has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date the revocation became effective. If the license was revoked under Subsection (b)(5), an applicant may not be granted another license until the appropriate number of years required under Section 41-5(a)(10)(B) has elapsed since the termination of any sentence. parole, or probation.

#### SEC. 41-11. APPEAL.

If the chief of police denies the issuance of a license, or suspends or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action and the right to an appeal. The aggrieved party may appeal the decision of the chief of police to a permit and license appeal board in accordance with Section 2-96 of this code. The filing of an appeal stays the action of the chief of police in suspending or revoking a license until the permit and license appeal board makes a final decision. If within a 10 day period the chief of police suspends, revokes, or denies issuance of a dance hall license or public house of amusement license for the same location involved in the chief's actions on the sexually oriented business license, then the chief may consolidate the requests for appeals of those actions into one appeal.

#### SEC. 41-12. TRANSFER OF LICENSE.

A licensee shall not transfer his license to another, nor shall a licensee operate a sexually oriented business under the authority of a license at any place other than the address designated in the application.

# SEC. 41-13. LOCATION OF SEXUALLY ORIENTED BUSINESSES.

- (a) A person commits an offense if he operates or causes to be operated a sexually oriented business within 1,000 feet of:
  - (1) a church;
- (2) a public or private elementary or secondary school;

- (3) a boundary of a residential district as defined by the Dallas Development Code;
- (4) a public park adjacent to a residential district as defined by the Dallas Development Code; or
- (5) the property line of a lot devoted to residential use.
- (b) A person commits an offense if he causes or permits the operation, establishment, substantial enlargement, or transfer of ownership or control of a sexually oriented business within 1,000 feet of another sexually oriented business.
- (c) A person commits an offense if he causes or permits the operation, establishment, or maintenance of more than one sexually oriented business in the same building, structure, or portion thereof, or the increase of floor area of any sexually oriented business in any building, structure, or portion thereof containing another sexually oriented business.
- (d) For the purposes of Subsection (a), measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises where a sexually oriented business is conducted, to the nearest property line of the premises of a church or public or private elementary or secondary school, or to the nearest boundary of an affected public park, residential district, or residential lot.
- (e) For purposes of Subsection (b) or this section, the distance between any two sexually oriented business shall be measured in a straight line, without regard to intervening structures of objects, from the closest exterior wall of the structure in which each business is located.

- on June 18, 1986, that is violation of Subsections (a), (b), or (c) of this section shall be deemed a nonconforming use. The nonconforming use will be permitted to continue for a period not to exceed three years, unless sooner terminated for any reason or voluntarily discontinued for a period of 30 days or more. Such nonconforming uses shall not be increased, enlarged, extended or altered except that the use may be changed to a conforming use. If two or more sexually oriented businesses are within 1,000 feet of one another and otherwise in a permissible location, the sexually oriented business which was first established and continually operating at a particular location is the conforming use and the later-established business(es) is nonconforming.
- (g) A sexually oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the location, subsequent to the grant or renewal of the sexually oriented business license, of a church, public or private elementary or secondary school, public park, residential district, or residential lot within 1000 feet of the sexually oriented business. This provision applies only to the renewal of a valid license, and does not apply when a application for a license is submitted after a license has expired or has been revoked.

# SEC. 41-14. EXEMPTION FROM LOCATION RESTRICTIONS.

(a) If the chief of police denies the issuance of a license to an applicant because the location of the sexually oriented business establishment is in violation of Section 41-13 of this chapter, then the applicant may, not later than 10 calendar days after receiving notice of the denial, file with the city secretary a written request for an exemption from the locational restrictions of Section 41-13.

- (b) If the written request is filed with the city secretary within the 10-day limit, a permit and license appeal board, selected in accordance with Section 2-95 of this code, shall consider the request. The city secretary shall set a date for the hearing within 60 days from the date the written request is received.
- (c) A hearing by the board may proceed if at least two of the board members are present. The board shall hear and consider evidence offered by any interested person. The formal rules of evidence do not apply.
- (d) The permit and license appeal board may, in its discretion, grant an exemption from the locational restrictions of Section 41-13 if it makes the following findings:
- That the location of the proposed sexually oriented business will not have a detrimental effect on nearby properties or be contrary to the public safety or welfare;
- (2) That the granting of the exemption will not violate the spirit and intent of this chapter of the city code;
- (3) That the location of the proposed sexually oriented business will not downgrade the property values or quality of life in the adjacent areas or encourage the development of urban blight;
- (4) That the location of additional sexually oriented business in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any efforts of urban renewal or restoration; and
- (5) That all other applicable provisions of this chapter will be observed.
- (e) The board shall grant or deny the exemption by a majority vote. Failure to reach a majority vote shall result

in denial of the exemption. Disputes of fact shall be decided on the basis of a preponderance of the evidence, the decision of the permit and license appeal board is final.

- (f) If the board grants the exemption, the exemption is valid for one year from the date of the board's action. Upon the expiration of an exemption, the sexually oriented cusiness is in violation of the locational restrictions of Section 41-13 until the applicant applies for and receives another exemption.
- (g) If the board denies the exemption, the applicant may not re-apply for an exemption until at least 12 months have elapsed since the date of the board's action.
- (h) The grant of an exemption does not exempt the applicant from any other provisions of this chapter other than the locational remarking of Section 41-13.

### SEC. 41-15. ADDITIONAL REGULATIONS FOR ESCORT AGENCIES.

- (a) An escort agency shall not employ any person under the age of 18 years.
- (b) A person commits an offense if he acts as an escort or agrees to act as an escort for any person under the age of 18 years.

### SEC. 41-16. ADDITIONAL REGULATIONS FOR NUDE MODEL STUDIOS.

- (a) A nude model studio shall not employ any person under the age of 18 years.
- (b) A person under the age of 18 years commits an offense if he appears in a state of nudity in or on the premises of a nude model studio. It is a defense to prosecution under this subsection if the person under 18 years was in a restroom no open to public view or persons of the opposite sex.

- (c) A person commits an offense if he appears in a state of nudity or knowingly allows another to appear in a state of nudity in an area of a nude model studio premises which can be viewed from the public right of way.
- (d) A nude model studio shall not place or permit a bed, sofa, or mattress in any room on the premises, except that a sofa may be placed in a reception room open to the public.

# SEC. 41-17. ADDITIONAL REGULATIONS FOR ADULT THEATERS AND ADULT MOTION PICTURE THEATERS.

- (a) The requirements and provisions of Chapter 46 of this code remain applicable to adult theatres and adult motion picture theaters.
- (b) A person commits an offense if he knowingly allows a person under the age of 18 years to appear in a state of nudity in or on the premises of an adult theater or adult motion picture theater.
- (c) A person under the age of 18 years commits an offense if he knowingly appears in a state of nudity in or on the premises of an adult theater or adult motion picture theater.
- (d) It is a defense to prosecution under Subsections (b) and (c) of this section if the person under 18 years was in a restroom not open to public view or persons of the opposite sex.

# SEC. 41-18. ADDITIONAL REGULATIONS FOR ADULT MOTELS.

(a) Evidence that a sleeping room in a hotel, motel, or similar commercial establishment has been rented and vacated two or more times in a period of time that is less than 10 hours creates a rebuttable presumption that the establishment is an adult motel as that term is defined in this chapter.

- (b) A person commits an offense if, as the person in control of a sleeping room in a hotel, motel, or similar commercial establishment that does not have a sexually oriented business license, he rents or subrents a sleeping room to a person and, within 10 hours from the time the room is rented, he rents or subrents the same sleeping room again.
- (c) For purposes of subsection (b) of this section, the terms "rent" or "subrent" mean the act of permitting a room to be occupied for any form of consideration.

#### SEC. 41-19. REGULATIONS PERTAINING TO EXHIBI-TION OF SEXUALLY EXPLICIT FILMS OR VIDEOS.

- (a) A person who operates or causes to be operated sexually oriented business, other than an adult motel, which exhibits on the premises in a viewing room of less than 150 square feet of floor space, a film, video cassette, or other video reproduction which depicts specified sexual activities or specified anatomical areas, shall comply with the following requirements:
- (1) Upon application for a sexually oriented business license, the application shall be accompanied by a diagram of the premises showing a plan thereof specifying the location of one or more manager's stations and the location of all overhead lighting fixtures and designating any portion of the premises in which patrons will not be permitted. A manager's station may not exceed thirty-two (32) square feet of floor area. The diagram shall also

designate the place at which the permit will be conspicuously posted, if granted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however each diagram should be oriented to the north or to some designated street or object and should be drawn to a designated scale or with marked dimensions sufficient to show the various internal dimensions of all areas of the interior of the premises to an accuracy of plus or minus six inches. The chief of police may waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the configuration of the premises has not been altered since it was prepared.

- (2) The application shall be sworn to be true and correct by the applicant.
- (3) No alteration in the configuration or location of a manager's station may be made without the prior approval of the chief of police or his designee.
- (4) It is the duty of the owners and operator of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.
- in such a manner that there is an unobstructed view from a manager's station of every area of the premises to which any patron is permitted access for any purpose excluding restrooms. Restrooms may not contain video reproduction equipment. If the premises has two or more manager's stations designated, then the interior of the premises shall be configured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose from at least one

of the manager's stations. The view required in this subsection must be by direct line of sight from the manager's station.

- (6) It shall be the duty of owners and operator, and it shall also be the duty of any agents and employees present in the premises to ensure that the view area specified in Subsection (5) remains unobstructed by any doors, walls, merchandise, display racks or other materials at all times that any patron is present in the premises and to ensure that no patron is permitted access to any area of the premises which has been designated as an area in which patrons will not be premitted in the application filed pursuant to Subsection (1) of this section.
- (7) The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminated every place to which patrons are permitted access at an illumination of not less one (1.0) footcandle as measured at the floor level.
- (8) It shall be the duty of the owners and operator and it shall also be the duty of any agents an employees present in the premises to ensure that the illumination described above, is maintained at all times that any patron is present in the premises.
- (b) A person having a duty under Subsections (1) through (8) of Subsection (a) above commits an offense if he knowingly fails to fulfill that duty.

# SEC. 41-20. DISPLAY OF SEXUALLY EXPLICIT MATERIAL TO MINORS.

(a) A person commits an offense if, in a business establishment open to persons under the age of 17 years, he displays a book, pamphlet, newspaper, magazine, film, or

video cassette, the cover of which depicts, in a manner calculated to arouse sexual lust or passion for commercial gain to exploit sexual lust or perversion for commercial gain, any of the following:

- human sexual intercourse, masturbation, or sodomy;
- (2) fondling or other erotic touching of human genitals, pubic region, buttocks, or female breasts;
- (3) less than less completely and opaquely covered human genitals, buttocks, or that portion of the female breast below the top of the areola; or
- (4) human male genitals in a discernibly turgid state, whether covered or uncovered.
- (b) In this section "display" means to locate an item in such a manner that, without obtaining assistance from an employee of the business establishment:
- (1) it is available to the general public for handling and inspection; or
- (2) the cover or outside packaging on the item is visible to members of the general public.

#### SEC. 41-21. ENFORCEMENT.

- (a) Except as provided by Subsection (b), any person violating Section 41-13 of this chapter, upon conviction, is punishable by a fine not to exceed \$1,000.
- (b) If the sexually oriented business involved is a nude model studio or sexual encounter center, then violation of Section 41-4(a) or 41-13 of this chapter is punishable as a Class B misdemeanor.

- (c) Except as provided by Subsection (b), any person violating a provision of this chapter other than Section 41-13, upon conviction, is punishable by a fine not to exceed \$200.
- (d) It is a defense to prosecution under Section 41-4(a), 41-13, or 41-16(d) that a person appearing in a state of nudity did so in modeling class operated:
- by a proprietary school licensed by the state of Texas; a college, junior college, or university supported entirely or partly by taxation;
- (2) by a private college or university which maintains and operates educational programs in which credits are transferrable to college, junior college, or university supported entirely or partly by taxation; or
  - (3) in a structure:
- (A) which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing; and
- (B) where in order to participate in a class a student must enroll at least three days in advance of the class; and
- (C) where no more than one nude model is on the premises at any one time.
- (e) It is a defense to prosecution under Section 41-4(a) or Section 41-13 that each item of descriptive, printed, film, or video material offered for sale or rental, taken as a whole, contains serious literary, artistic, political, or scientific value.

#### SEC. 41-22. INJUNCTION.

A person who operates or causes to be operated a sexually oriented business without a valid license or in violation of Section 41-13 of this chapter is subject to a suit for injuction as well as prosecution for criminal violations.

#### SEC. 41-23. AMENDMENT OF THIS CHAPTER.

Sections 41-13 and 41-14 of this chapter may be amended only after compliance with the procedure required to amend a zoning ordinance. Other sections of this chapter may be amended by vote of the city council."

SECTION 2. That Section 31-24, "Prohibiting Display of Sexually Explicit Material to Minors," of CHAPTER 31, "OFFENSES-MISCELLANEOUS," of the Dallas City Code, as amended, is repealed.

SECTION 3. That Section 31-26, "Prohibiting Operation of Certain Enterprises in Specified Areas," of CHAPTER 31, "OFFENSES-MISCELLANEOUS," of the Dallas City Code, as amended, is repealed.

SECTION 4. That Resolution Number 86-1010, adopted by the City Council March 26, 1986, imposing a moratorium on building permits and certificates of occupancy, is repealed.

SECTION 5. That the terms and provisions of this ordinance are severable and are governed by Section 1-4 of CHAPTER 1 of the Dallas City Code, as amended.

SECTION 6. That all persons required by this chapter to obtain a sexually oriented business license are hereby granted a grace period, beginning June 18, 1986, and ending July 18, 1986, in which to make application for the license.

SECTION 7. That this ordinance shall take effect immediately from and after its passage and publication in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so ordained.

#### APPROVED AS TO FORM: ANALESLIE MUNCY, City Attorney

By / s / Mark O'Briant Assistant City Attorney

Passed and correctly enrolled Jun 18 1986 6172H

#### APPENDIX H

#### **ORDINANCE NO. 19377**

An ordinance amending Sections 41A-2, 41A-5, 41A-7, 41A-10, and 41A-13 of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended; amending definitions; adding definitions of "residential district" and "residential use"; amending provisions dealing with the issuance of licenses for sexually oriented businesses; amending inspection provisions; amending revocation provisions; providing a penalty not to exceed \$1,000; providing a saving clause; providing a severability clause; and providing an effective date.

WHEREAS, the city plan commission and the city council, in accordance with the provisions of state law and the applicable ordinances of the city, have given the required notices and have held the required public hearings regarding this amendment to CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended; and

WHEREAS, on June 18, 1986, the city council rassed Ordinance No. 19196, which amended the Dallas City Code, as amended, by adding Chapter 41A, "SEXUALLY ORIENTED BUSINESSES"; and

WHEREAS, on August 6, 1986, the city council adopted Resolution No. 86-2453, clarifying certain definitions in Ordinance No. 19196; and

WHEREAS, Section 3 of Resolution No. 86-2453 directed the city attorney to draft an ordinance amending Section 41A-13(a) of the city code in a manner consistent with the intent expressed in Resolution No. 86-2453; and

WHEREAS, the city attorney has drafted this ordinance in accordance with the directive of Resolution No. 86-2453; and

WHEREAS, the city attorney has further advised that enforcement of Ordinance No. 19196 can be enhanced by amending certain of its provisions dealing with issuance and revocation at licenses and inspection provisions relating to sexually oriented businesses; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That Subsection (13) of Section 41A-2, "Definitions," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended to read as follows:

#### "(13) NUDITY or a STATE OF NUDITY means:

- (A) the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast, or
- (B) a state of dress which fails to opaquely cover a human buttock, anus, male genitals, female genitals, or areola of the female breast."
- SECTION 2. That Subsections (15) through (21) of Section 41A-2, "Definitions," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, are hereby renumbered as Subsections (17) through (23) respectively.
- SECTION 3. That Section 41A-2, "Definitions," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended by adding new Subsections (15) and (16) to read as follows:

- "(15) RESIDENTIAL DISTRICT means a single family, duplex, townhouse, multiple family or mobile home zoning district as defined in the Dallas Development Code.
- (16) RESIDENTIAL USE means a single family, duplex, multiple family, or "mobile home park, mobile home subdivision, and campground" use as defined in the Dallas Development Code."

SECTION 4. That Section 41A-5, "Issuance of License," of CHAPTER 41A, "SEXUALLY ORIENTED BUSI-NESSES," of the Dallas City Code, as amended is amended to read as follows:

#### "SEC. 41A-5. ISSUANCE OF LICENSE.

- (a) The chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:
  - (1) An applicant is under 18 years of age.
- (2) An applicant or an applicant's spouse is overdue in his payment to the city of taxes, fees, fines, or penalties assessed against him or imposed upon him in relation to a sexually oriented business.
- (3) An applicant has failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form.
- (4) An applicant or an applicant's spouse has been convicted of a violation of a provision of this chapter, other than the offense of operating a sexually oriented business without a license, within two years immediately preceding the application. The fact that a conviction is being appealed shall have no effect.

- (5) An applicant is residing with a person who has been denied a license by the city to operate a sexually oriented business within the preceding 12 months, or residing with a person whose license to operate a sexually oriented business has been revoked within the preceding 12 months.
- (6) The premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances.
- (7) The license fee required by this chapter has not been paid.
- (8) An applicant has been employed in a sexually oriented business in a managerial capacity within the preceding manage a sexually oriented business premises in a peaceful and law-abiding manner, thus necessitating action by law enforcement officers.
- (9) An applicant or the proposed establishment is in violation of or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19 or 41A-20.
- (10) An applicant or an applicant's spouse has been convicted of [or is under indictment or misdemeanor information for] a crime:
  - (A) involving:
- (i) any of the following offenses as described in Chapter 43 of the Texas Penal Code:
  - (aa) prostitution;
  - (bb) promotion of prostitution;
  - (cc) aggravated promotion of prostitution;

- (dd) compelling prostitution;
- (ee) obscenity;
- (ff) sale, distribution, or display of harmful material to minor;
  - (gg) sexual performance by a child;
  - (hh) possession of child pornography;
- (ii) any of the following offenses as described in Chapter 21 of the Texas Penal Code:
  - (aa) public lewdness;
  - (bb) indecent exposure;
  - (cc) indecency with a child;

# (iii) engaged in organized criminal activity as described in Chapter 71 of the Texas Penal Code;]

- (iii) [(iv)] sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;
- (iv) [(v)] incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code;
- (vi) kidnapping or aggravated kidnapping as described in Chapter 20 of the Texas Penal Code:
- (vii) robbery or aggravated robbery as described in Chapter 29 of the Texas Penal Code:
- (viii) bribery or retaliation as described in Chapter 36 of the Texas Penal Code;
- (ix) a violation of the Texas Controlled Substances Act or Dangerous Drugs Act punishable as a felony, Class A misdemeanor, or Class B misdemeanor, or

- (v) [(x)] riminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;
  - (B) for which:
- (i) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;
- (ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or
- (iii) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemeanor offenses or combination of misdemeanor offenses occurring within any 24-month period.
- (b) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or applicant's spouse.
- (c) An applicant who has been convicted or whose spouse has been convicted of an offense listed in Subsection (a)(10)[, for which the required time period has elapsed since the date of conviction or the date of release from confinement imposed for the conviction.] may qualify for a sexually oriented business license only when the time period required by Section 41A-5(a)(10)(B) has elapsed. [if the chief of police determines that the applicant or applicant's spouse is presently fit to operate a sexually oriented business. In determining present fitness under this section, the chief of police shall consider the following factors concerning the applicant or applicant's spouse, whichever had the criminal conviction;

- (1) the extent and nature of his past criminal activity;
- (2) his age at the time of the commission of the crime;
- (3) the amount of time that has elapsed since his last criminal activity,
- (4) his conduct and work activity prior to and following the criminal activity;
- (5) evidence of his rehabilitation or rehabilitative effort while incarcerated or following release; and
- (6) other evidence of his present fitness, including letters of recommendation from prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for him; the sheriff and chief of police in the community where he resides; and any other persons in contact with him.
- (d) It is the responsibility of the applicant, to the extent possible, to secure and provide to the chief of police the evidence required to determine present fitness under subsection (c) of this section.]
- (d) [(e)] The license, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, and the address of the sexually oriented business. The license shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time."
- SECTION 5. That Section 41A-7, "Inspection," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended by adding a new Subsection (c), to read as follows:

"(c) The provisions of this section do not apply to areas of an adult motel which are currently being rented by a customer for use as a permanent or temporary habitation."

SECTION 6. That Subsections (d) and (e) of Section 41A-10, "Revocation," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, are amended to read as follows:

- "(d) Subsection (b)(7) does not apply to adult motels as a ground for revoking the license unless the licensee or employee knowingly allowed the act of sexual intercourse, sodomy, oral copulation, masturbation, or sexual contact to occur in a public place or within public view.
- (e) When the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a sexually oriented business license for one year from the date revocation became effective. If, subsequent to revocation, the chief of police finds that the basis for the revocation has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date the revocation became effective. If the license was revoked under Subsection (b)(5), an applicant may not be granted another license until the appropriate number of years required under Section 41A-5(a)(10)(B) has elapsed [since the termination of any sentence, parale, or probation]."

SECTION 7. That Subsection (a) of Section 41A-13, "Location of Sexually Oriented Businesses," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended to read as follows:

"(a) A person commits an offense if he operates or causes to be operated a sexually oriented business within 1.000 feet of:

- (1) a church;
- (2) a public or private elementary or secondary school;
- (3) a boundary of a residential district as defined in this chapter [by the Dallas Development Code];
- (4) a public park adjacent to a residential district as defined in this chapter [by the Dallas Development Code];
   or
- (5) the property line of a lot devoted to a residential use as defined in this chapter."

SECTION 8. That a person violating a provision of this ordinance, upon conviction, is punishable by a fine not to exceed \$1,000.

SECTION 9. That CHAPTER 41A of the Dallas City Code, as amended, shall remain in full force and effect, save and except as amended by this ordinance.

SECTION 10. That the terms and provisions of this ordinance are severable and are governed by Section 1-4 of CHAPTER 1 of the Dallas City Code, as amended.

SECTION 11. That this ordinance shall take effect immediately from and after its passage and publication in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so ordered.

October 12, 1986

# OPPOSITION

BRIEF

M E M

CLERK CO.

NO. 87-2012

In The

# Supreme Court Of The United States OCTOBER TERM, 1967

FW/PBS, INC., et ol,

Petitioners,

US.

THE CITY OF DALLAS, TEXAS, et al,
Respondents.

# ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

#### RESPONDENTS' BRIEF IN OPPOSITION

CARROLL R. GRAHAM
Co-vinel Of Record
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In The

Statistas and Ordinances

#### Supreme Court Of The United States OCTOBER TERM, 1987

FW/PBS, Inc., et al,

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THE CITY OF DALLAS, TEXAS, et al,
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#### ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

#### RESPONDENTS' BRIEF IN OPPOSITION

#### STATEMENT OF THE CASE

Respondent City of Dallas is substantially satisfied with the accuracy of Petitioners' statement of the case but believes it to be incomplete. Respondents offer the following by way of clarification.

After considering the studies of other metropolitan cities on the effects of sexually oriented businesses upon neighborhoods, as well as its own crime rate study, the City of Dallas enacted a Sexually Oriented Business Ordinance. The ordinance regulates sexually oriented businesses in two basic ways: zoning restrictions and a license requirement.

Petitioners care confusion by alternately referring to the Ordinance as Chapter 41 and mapter 41A of the Dallas City Code. The correct designation is Chapter 41A. See Dumas v. City of Dallas, 648 P.Supp. 1061, 1078-1089 (N.D. Tex. 1986).

The zoning provisions prohibit such businesses from locating within 1000 feet of a church, school, residential area, public park adjacent to a residential area, or another sexually oriented business. Businesses located within 1000 feet of one of the prohibited areas are given a three-year amortization period if they were already operating on the effective date of the Ordinance. Section 41A-13, Dallas City Code.

The licensing provisions require a license to be obtained by those establishments meeting the Ordinance's definition of a "sexually oriented business." Section 41A-4 and 41A-2, Dallas City Code. A license is not available to persons recently convicted of certain sex-related crimes. However, an individual convicted of those crimes may again become eligible for a license two years after the date of conviction or end of confinement, whichever is later. In the case of convictions for felonies or multiple misdemeanors, the waiting period is five years.

Immediately after passage of the Ordinance, a variety of adult entertainment establishments attacked its constitutionality in three separate federal suits, one of which was brought by Petitioners. Each of the suits sought declaratory and injunctive relief. The suits were consolidated, and the case was submitted for decision on cross-motions for summary judgment filed by all parties. No party objected to resolution of the issues by summary judgment.<sup>2</sup>

The District Court upheld the constitutionality of the Ordinance, with the exception of four relatively minor

The District Court made a number of findings which are pertinent to this Petition for Certiorari. First, the Court found that the Ordinance was content-neutral, focusing on the secondary effects of sexually oriented businesses and having only an incidental impact on protected speech, and that it satisfied the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968). Second, the Court found that the land available for the relocation of existing businesses and the establishment of new businesses was substantial, constituting 8-10% of the City's total area. The Court further found that the Ordinance's three-year amortization period was generous and constituted "... a valid mechanism used to enforce valid locational regulations."

Regarding the licensing provisions, the District Court found that the requirement of a license for sexually oriented businesses is constitutional, and that the denial of licenses to persons convicted of specified sex-related crimes is reasonably related to the crime-control intent of the Ordinance and is consistent with Arcara v. Cloud Books, Inc., 478 U.S. \_\_\_\_, 106 S.Ct. 3175 (1986). Last, the Court held that the Ordinance provides procedural due process of law and satisfies the standard of Freedman v. Maryland, 380 U.S. 51 (1965).

The Fifth Circuit upheld the District Court decision in all respects. The Court disagreed, however, that a content-neutral regulation such as the Dallas Ordinance must meet the Freedman standard of due process. Instead, the Court found

<sup>&</sup>lt;sup>2</sup>See FW/PBS v. City of Dallas, 837 F.2d 1298, 1303 (5th Cir. 1988), and Dumas v. City of Dallas, 648 F.Supp. 1061, 1064 n. 5, and 1068 n. 17 (N.D. Tex. 1986).

<sup>&</sup>lt;sup>3</sup>See Ordinance 193.7, appearing as Appendix H of the Petition for Writ of Certiorari.

<sup>\*</sup>Dumas v. City of Dallas, 648 F.Supp. 1061, 1070-71 (N.D. Tex. 1986)

<sup>5</sup>Id. at 1071.

old. at 1071, 1073-74.

that the Ordinance, being content-neutral, need only meet the standards applicable to time, place, and manner regulations and that it did so.<sup>7</sup>

The Court of Appeals agreed that the Ordinance's use of criminal convictions to deny licensing for a limited period of time is constitutional. The Court found that ineligibility results only from the recent commission of sex-related crimes and that the City had demonstrated a substantial relationship between the conviction and the evil to be regulated. The Court stated additionally that the Ordinance in this regard might well meet a strict scrutiny test as well as a substantial relationship test.<sup>8</sup>

Finally, the Court held that the District Court had before it sufficient evidence to conclude that the Ordinance allows adequate alternative sites for the relocation of sexually oriented businesses.<sup>9</sup>

# ARGUMENTS SUPPORTING DENIAL OF THE WRIT

THE FIFTH CIRCUIT'S DECISION UPHOLDING THE CONSTITUTIONALITY OF THE ORDINANCE IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT AS WELL AS OTHER FEDERAL APPELLATE DECISIONS

A. The Fifth Circuit and District Court Correctly Held That Temporary Denial of a Sexually Oriented Business License to Persons Recently Convicted of Specified Sex-Related Crimes Does Not Violate the Constitution and is Consistent with This Court's Decisions in Arcara v. Cloud Books, Inc. and City of Renton v. Playtime Theatres, Inc.

Petitioners assert that the provisions of the Ordinance allowing denial of a license to a person with certain specified convictions act as a prior restraint on expression. This contention was correctly rejected by both the Fifth Circuit<sup>10</sup> and the District Court.<sup>11</sup>

In City of Renton v. Playtime Theatres, Inc., 12 this Court faced a zoning ordinance similar to the Dallas ordinance. In upholding the Renton ordinance this Court tested the ordinance under the time, place, or manner analysis reserved for content-neutral regulations, even though the Ordinance clearly distinguished among businesses according to the content of their products.

This Court gave two reasons for applying the time, place, or manner analysis. First, the ordinance could be treated as content-neutral because its purpose was not to suppress speech of a particular content, but to control the effects of certain businesses on the urban environment. As long as the City's predominant concern was to curb the secondary effects of adult businesses on neighborhoods, the ordinance could distinguish between types of businesses without engaging in content-based regulation.

Second, this Court affirmed that sexually oriented materials are entitled to less First Amendment protection than other forms of protected expression. The plurality opinion in Young v. American Mini-Theatres had expressed this

<sup>&</sup>lt;sup>1</sup>FW/PBS v. City of Dallas, 837 F.2d 1298, 1301-1303 (5th Cir. 1988).

old. at 1304-1305.

old. at 1303.

<sup>19</sup>FW/PBS v. City of Dallas, 837 F.2d at 1304-05.

<sup>11</sup> Dumas v. City of Dallas, 648 F.Supp. at 1073-74.

<sup>12475</sup> U.S. 41 (1986)

principle in stating that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate ..." City of Renton, 106 S.Ct. at 929-30, quoting Young, 427 U.S. at 70.

The Fifth Circuit recognized that this reasoning applies with equal force to the Dallas ordinance. The type of activity regulated is the same as in City of Renton, and there was abundant evidence that the predominant concern of the Dallas City Council in enacting the Ordinance was to limit the secondary effects of sexually oriented businesses and not the content of their products.

Accordingly, the Fifth Circuit held that as a content-neutral regulation, the Dallas Ordinance — including the details of its licensing scheme — should be judged under a "time, place, and manner" analysis in accordance with Young v. American Mini-Theatres and City of Renton. As the Court noted, the "time, place, and manner" standard cannot be limited solely to regulation of "place." Therefore, the regulations of the Ordinance are constitutional if they are narrowly tailored to serve a substantial governmental interest while leaving open alternative channels of communication.<sup>13</sup>

#### **Use of Criminal Convictions**

The Dallas ordinance, including its criminal conviction disability, clearly meets this test. First, by limiting the disability to specified crimes that are sexual in nature, the Ordinance exhibits a substantial relationship between the conviction on which denial is based and the evil sought to be prevented. Indeed, the Fifth Circuit found that the Ordinance might well meet a strict scrutiny standard as well as

13SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1273 (5th Cir. 1988).

the substantial relationship test. FW/PBS v. City of Dallas, 837 F.2d at 1304-05. The City Council's objective in enacting the Ordinance was to ameliorate the effects of sexually oriented businesses on neighborhoods — including the prevention of crime. By its use of sex-related crimes as an occupational disability, the Ordinance is "narrowly tailored to avoid licensure of those who have recently shown a predilection toward the criminal conduct the Ordinance was designed to overcome." 14

Second, Petitioners overlook the effect of this Court's ruling in Arcara v. Cloud Books, Inc., 478 U.S. \_\_\_\_, 103 S.Ct. 3175, 92 L.Ed.2d 568 (1986). In Arcara, this Court upheld a New York law permitting closure of a sexually oriented bookstore for one year because of acts of prostitution and public lewdness occurring on the premises with the knowledge of management. As in Arcara, the crimes listed in the Dallas Ordinance as a basis for denying licensure (prostitution, public lewdness, sexual assault, etc.) manifest "no element of protected expression" under the First Amendment. Arcara, 106 S.Ct. at 3176-77. As such, they may be used to deny licensure. If criminal conduct will permit closure of an adult business, it follows that one who has recently been convicted of a sex-related crime may for a time be denied a license to operate a sexually oriented business. If

Additionally, it must be stressed that the Dallas ordinance permits the licensing of former offenders after the passage of a specified amount of time.<sup>17</sup> For example, a person

<sup>14</sup>Dumas v. City of Dallos, 648 F.Supp. at 1074 n. 34.

<sup>&</sup>lt;sup>19</sup>The crime of Obscenity also involves no protected expression under the First Amendment. Roth v. United States, 354 U.S. 476 (1957); Miller v. California, 413 U.S. 15 (1973).

<sup>16</sup> Dumas v. City of Dallas, 648 F.Supp. at 1074 n. 34.

<sup>&</sup>lt;sup>17</sup>Section 41A-5(c), as amended by Ordinance 19377, Appendix H of the Petition for Writ of Certiorari.

convicted of Promotion of Obscenity, a misdemeanor under Texas law, may receive a license two years after his date of conviction or end of confinement, whichever is later, under the terms of the Ordinance. Just as the New York law in Arcara permitted the closure of a business for one year based upon criminal conduct, the Dallas ordinance withholds licensing for certain sex-related offenses for a limited period of time. The Dallas ordinance is consistent with Arcara.

Petitioners' reliance on Vance v. Universal Amusements Co., 445 U.S. 308 (1980) is misplaced. In that case the challenged regulation prohibited the commercial exhibition of "obscene material" with no requirement of a judicial determination of obscenity prior to the suppression. The law was clearly content-based. The Dallas Ordinance is content-neutral, and its denial of a sexually oriented business license to those convicted of sexually oriented crimes is but a temporary occupational disability. It does not bar the exhibition of any particular film or book and, unlike the cases cited by Petitioners, it is not directed at future expression. It merely acts as a short-term disability of particular persons to enter into or continue in a regulated occupation. As the Fifth Circuit noted, it is an accepted principle of the police power that "the government may attach to criminal convictions disabilities aimed at preventing recidivism." FW/PBS v. City of Dallas, 837 F.2d at 1305, citing inter alia DeVeau v. Braisted, 363 U.S. 144, 155-59 (1960) (plurality opinion) ("Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas").

The other cases cited by Petitioners are pre-Arcara cases involving content-based regulations directed specifically

18 Section 43.23, Texas Penal Code.

In addition to this Court's ruling in Arcara, numerous lower court decisions have upheld the use of rationally-related criminal convictions to deny or revoke sexually oriented business occupational licenses, including two cases in which this Court denied certiorari. The Ordinance's limited use of criminal convictions is narrowly tailored to further a substantial governmental interest and is consistent with this Court's rulings in Arcara and City of Renton.

B. The Courts Below Correctly Held That the Ordinance is Content-Neutral and Does Not Unconstitutionally Single Out Businesses Engaged in First Ar endment Activities.

Petitioners assert that the regulator provisions of the Ordinance inevitably "single out" businesses engaged in First Amendment activities, contrary to Arcara v. Cloud Books, Inc., supra. Specifically, Petitioners complain of the provisions making sexually oriented businesses subject to licensing, inspections, and requiring enclosed booths to be open to view from a manager's station.

<sup>&</sup>lt;sup>19</sup>For example, Petitioners cite City of Paducah v. Investment Entertainment, 791 F.2d 463 (6th Cir. 1986), cert. denied 107 S.Ct. 316 (1986). In that case a license could be revoked upon the administrative finding of a Board that an allegedly obscene film had been shown. Contra, the Dallas Ordinance requires a judicial finding of obscenity through its requirement of a court conviction.

<sup>&</sup>lt;sup>20</sup>106 Forsyth Corp. v. Bishop, 482 F.2d 280 (5th Cir. 1973), cert. denied 422 U.S. 1044 (1975); Airport Bookstore, Inc. v. Jackson, 248 S.E.2d 623 (Ga. 1978), cert. denied sub nom. Gateway Books v. Jackson, 441 U.S. 952 (1979).

For similar decisions see Chulchian v. City of Indianapolis, 633 F.2d 27 (7th Cir. 1980); Broadway Books v. Roberts, 642 F.Supp. 486 (E.D. Tenn. 1986); Borrago v. City of Louisville, 456 F.Supp. 30, 32 (W.D. Ky. 1978); West Gallery Corp. v. Salt Lake City Board of Commissioners, 586 P.2d 429 (Utal. 1978).

In City of Renton, supra, this Court held that contentneutral ordinances having an incidental impact on free expression may be analyzed under a time, place, and manner standard of review.<sup>21</sup> The Fifth Circuit in the instant case accordingly applied this standard of review and found that the regulatory provisions of the Ordinance are reasonable and are not unduly burdensome under the First Amendment.

Additionally in Young v. American Mini-Theatres, supra, this Court noted that even in the area of protected expression, a difference in content may invoke a different governmental response.<sup>22</sup> Although the impetus for a law may be the type of content communicated by targeted businesses, the government may permissibly tailor its reaction to different messages according to the degree to which its interests are implicated. Young, 427 U.S. at 82 n. 6 (1976) (Powell, J., concurring).

Accordingly, the Dallas Ordinance has imposed reasonable time, place, and manner regulations which, although directed at businesses of a particular nature (some but not all of which engage in First Amendment activities), constitute a legitimate governmental response to the problems generated by such businesses.

Numerous court decisions have upheld the regulatory provisions of which Petitioners complain. The concept of licensing sexually oriented business has been upheld against First Amendment and prior restraint challenges.<sup>23</sup> Indeed,

21 City of Renton v. Playtime Theatres, Inc., 106 S.Ct. at 927.

22 Young v. American Mini-Theatres, 427 U.S. at 66.

Reasonable inspection requirements for sexually oriented establishments have similarly been upheld.<sup>24</sup> The Fifth Circuit in this case stated that sexually oriented ousinesses are subject to such pervasive governmental regulation that the Ordinance's inspection provisions are presumptively reasonable. FW/PBS v. City of Dallas, 837 F.2d at 1306.

Likewise, the Ordinance's provisions requiring viewing booths in adult theatres to be open to view from a manager's station are valid under the City of Renton standard. Such requirements have been upheld by the Fourth, Fifth, and Ninth Circuits, as advancing a substantial governmental interest in preventing crime and maintaining sanitary conditions.<sup>25</sup>

Contrary to the Petitioners' assertion, the Dallas Ordinance does not unconstitutionally single out businesses

<sup>&</sup>lt;sup>29</sup>Wall Distributors, Inc. v. City of Newport News, 782 F.2d 1165, 1171 (4th Cir. 1986); FW/PBS v. City of Dallas, supra; SDJ, Inc. v. City of Houston, 837 F.2d 1268 (5th Cir. 1988); Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980).

<sup>&</sup>lt;sup>24</sup> Pollard v. Cockrell, 578 F.2d 1002, 1014 (5th Cir. 1978); Harper v. Lindsay, 616 F.2d 849, 858 (5th Cir. 1980); Broadway Books v. Roberts, 642 F.Supp. 486, 504 (E.D. Tenn. 1986).

<sup>≈</sup>FW/PBS v. City of Dallas, 837 F.2d 1298, 1304 (5th Cir. 1988); Wall Distributors, Inc. v. City of Newport News, 782 F.2d 1165, 1169 (4th Cir. 1986); Ellwest Stereo Theatres, Inc. v. Wenner, 681 F.2d 1243 (9th Cir. 1982). See also Broadway Books v. Roberts, 642 F.Supp. 486 (E.D. Tenn. 1986).

engaged in First Amendment activities. Although by its terms the Ordinance is certainly directed at a particular type of business — those dealing in sexually oriented materials or activities — not all of those businesses engage in activities protected by the First Amendment. For example, the Ordinance regulates nude model studios and escort agencies, neither of which involve First Amendment expression.<sup>28</sup>

Additionally, the fact that an ordinance applies to businesses of a particular type does not make it a content-based regulation, as this Court so stated in Young and City of Renton. The Dallas Ordinance is a valid legislative decision by the Dallas City Council to treat sexually oriented businesses differently because they have "markedly different effects upon their surroundings." Young, 427 U.S. at 82 n. 6 (Powell, J., concurring). The Dallas licensing regulations are reasonable under the time, place, and manner test and are not in conflict with any decision of this Court.

C. The Courts Below Correctly Held That the Ordinance Provides Adequate Procedural Safeguards and Is Consistent With the Decisions of This Court

Both the District Court and Fifth Circuit found that the Ordinance provides adequate procedural safeguards which prevent the licensing requirements from acting as a prior restraint on speech. Petitioners, however, persist in the argument that the Ordinance constitutes a prior restraint.

Petitioners assert that the Ordinance is governed by and fails to meet the standards of Freedman v. Maryland, 380

U.S. 51 (1965). However, as was held by the Fifth Circuit, the Freedman standard is inapplicable to a content-neutral regulation such as the Dallas ordinance. The Court noted that after the City of Renton decision, a content-neutral ordinance which regulates the effects of sexually oriented businesses without engaging in content-based regulation, ... need only meet the standards applicable to time, place, and manner restrictions and need not comply with Freedman's more stringent limits on regulations aimed at content. FW/PBS v. City of Dallas, 837 F.2d at 1303.

And as the Fifth Circuit correctly pointed out, the First Amendment protection required for political or religious activities, such as those involved in Fernandes v. Limmer, 28 ... is of a different order than the protection due sexually oriented businesses. \* \* \* What is being limited here is not a particular movie — as in Freedman — nor episodic solicitation efforts — as in Fernandes — but a long-term commercial business." FW/PBS v. City of Dallas, id. at 1303.

The cases cited by Petitioners in support of their Freedman argument are easily distinguishable. Each of them involves content-based regulations involving a direct impact on the suppression of speech. The regulations involved in City of Paducah v. Investment Entertainment<sup>29</sup> and Entertainment Concepts, Inc. v. Maciejewski<sup>20</sup> were local obscenity ordinances which called upon a city board to review particular films and make administrative findings of obscenity. In Freedman v. Maryland, the Maryland statute at issue

<sup>\*</sup>See Stansberry v. Holmes, 613 F.2d 1285, 1288 (5th Cir. 1980), cert. denied 101 S.Ct. 240 (1980), and Purple Onion v. Jackson, 411 F.Supp. 1207, 1227 (N.D. Ga. 1981) (nude model studios); and People v. Katrinak, 185 Cal. Rptr. 869, 136 Cal.App.3d 145 (1982) (escort agencies).

<sup>&</sup>lt;sup>27</sup>Accord, Bayside Enterprises, Inc. v. Carson, 470 F.Supp. 1140, 1149 (M.D. Fla. 1979).

<sup>2663</sup> F.2d 619 (5th Cir. 1981), cert. dismissed 458 U.S. 1224 (1982).

<sup>2791</sup> F.2d 463 (6th Cir. 1986), cert. denied 93 L.Ed.2d 290 (1986).

<sup>5631</sup> F.2d 497 (7th Cir. 1980), cert. denied 450 U.S. 919 (1981).

actually required the films themselves to be licensed and directed the Board of Censors to deny licensure to films deemed to be "obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals ... " Freedman v. Maryland, 380 U.S. 51, 52 n. 2 (1965). The Dallas Ordinance, as stated, is a content-neutral regulation directed at curbing secondary effects and not the content of expression itself.

It should be remembered that even if this Court believes that the Freedman standard applies to the Dallas ordinance, the District Court found that Freedman was satisfied,<sup>31</sup> holding that

"The appeal, revocation, and suspension provisions are replete with procedural protections and reviewable standards, and comport with *Freedman* and fundamental tenets of due process." *Dumas v. City of Dallas*, 648 F.Supp. at 1075.

D. The Adequacy of Alternative Sites for Relocation of Sexually Oriented Businesses is an Evidentiary Issue Resolved Against Petitioners and is Not Appropriate for Review by This Court.

Section 41A-13 of the Ordinance prohibits sexually oriented businesses from locating within 1000 feet of churches, schools, residential areas, parks adjacent to residential areas, and other sexually oriented businesses. Businesses existing prior to the enactment of the Ordinance which violate the location restrictions are declared nonconforming uses and are given three years in which to relocate.

Before enacting the Ordinance, both the Planning Commission and the Dallas City Council separately found, based upon the evidence presented to them, that the Ordinance provides adequate alternative sites for relocation. The District Court gave deference to the City Council findings (TR. at 154), but also found that the evidence presented upon cross-motions for summary judgment by both Plaintiffs and Defendants fully supported those findings. See City's Exhibits No. 15 and 27 and Plaintiff's Exhibits No. 1, 3, 4, and 5 referred to in Dumas v. City of Dallas, 648 F.Supp. at 1071.

Petitioners are now asking this Court to overturn an evidentiary finding of the District Court. This position is based upon the conclusory allegations of a witness of Petitioners who, based on a one-day inspection, contended that a maximum of fifty commercially viable locations were available. (Affidavit of Patrick Stewart, Plaintiff's Exhibit No. 5, pages 6 and 8). This contention is unsupported by the record and was rejected by the District Court in reaching its conclusion that the Ordinance provides for adequate alternative locations as required by Young and City of Renton. The District Court characterized Mr. Stewart's affidavit as speaking only to commercial desirability of certain areas. Dumas v. City of Dallas, 648 F.Supp. at 1071, n. 23.

This case was submitted for decision, without objection, upon cross-motions for summary judgment and the supporting record.<sup>32</sup> The District Court found that approximately eight to ten percent of the city's total area (21,000 acres) was available for the location of sexually oriented businesses;<sup>33</sup> that the available areas stretched from the inner city area to

<sup>&</sup>lt;sup>31</sup>As the District Court noted, 648 F.Supp. at 1075, prompt judicial review of an adverse licensing decision is available to any party in addition to the Ordinance's administrative appeal procedures. Restraining orders (Chapter 65, TEX.CIV.PRAC. & REM. CODE) and writs of mandamus are among the remedies available under Texas law.

<sup>&</sup>lt;sup>29</sup>See FW/PBS v. City of Dallas, 837 F.2d at 1303, and Dumas v. City of Dallas, 648 F.Supp. at 1064 n. 5, and 1068 n. 17.

<sup>20</sup> Compare City of Renton, supra (five percent).

the north and south suburbs; and that the alternative sites were feasible locations for such businesses. The Court concluded that the Ordinance permits "reasonable alternative avenues of communication" and satisfies Basiardanes v. City of Galveston to and City of Renton. The Fifth Circuit held that the District Court had evidence before it sufficient to sustain its findings. The suburbance of the court had evidence before it sufficient to sustain its findings.

It is evident that in making its findings the District Court considered all of the evidence, including Stewart's affidavit, and found that the City had produced evidence proving that adequate alternative sites exist as a matter of law. The record supports the findings of the District Court, and Petitioners are bound by that record.

#### The Amortization Period

Petitioners go on to suggest that Young v. American Mini-Theatres created a constitutional right to a grandfather clause in all sexually oriented business ordinances. Petitioners have missed the point of Young. In Young the pivotal issue was not whether one or more existing businesses would have to move, but whether the ordinance as enacted would have the effect of greatly restricting the public access to protected materials. Young created no constitutional right of a business to remain at a location for as long as it chooses; it merely protected the access of the public to sexual materials protected by the First Amendment.

Although the Dallas Ordinance does not grandfather nonconforming uses, it does provide them with a three-year In asserting that an ordinance may not require the relocation of existing sexually oriented businesses, Petitioners cite Adultworld Bookstore v. City of Fresno, 738 F.2d 1348 (9th Cir. 1985), wherein the Ninth Circuit stated:

There are apparently no appellate cases since Young v. American Mini-Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), which have upheld the constitutionality of an ordinance which requires the relocation of existing adult-type businesses. 758 F.2d 1348, 1351.

Respondents respectfully submit that the Ninth Circuit was incorrect. At the time the above statement was made, at least two such appellate cases after Young had been decided, and this Court denied certiorari in both.

In Hart Book Stores v. Edmisten, 612 F.21 812 (4th Cir. 1979), the Fourth Circuit upheld a North Carolina statute with a six-month amortization period. This Court denied

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<sup>34</sup>Dumas v. City of Dallas, 648 F.Supp. at 1070-71.

<sup>8682</sup> F.2d 1203 (5th Cir. 1982).

<sup>≈</sup>FW/PBS v. City of Dallas, 837 F.2d at 1303.

<sup>37</sup>Section 41A-l3(f), Dallas City Code.

The exemption provision (Section 41A-14) permits applicants whose licenses were denied for zoning reasons to apply for an exemption from the locational restrictions. See Young v. American M. :-Theatres, 427 U.S. at 54 n. 7, and 56 (1976).

<sup>\*\*</sup>See Hart Book Stores v. Edmisten, 612 F.2d 821, 830 (4th Cir. 1979), cert. denied 447 U.S. 929 (1980) (upholding six-month amortization period); Northend Cinema, Inc. v. Seattle, 585 P.2d 1159, 1160 (Wash. 1970), cert. denied sub nom. Apple Theatre v. Seattle, 441 U5 946 (1970) (upholding three-month amortization period).

See also SDJ, Inc. v. City of Houston. 636 F.Supp. 1359, 1370-71 (S.D. Tex. 1986), affirmed at 837 F.2d 1268 (5th Cir. 1988) (six-month period); and Note, Using Constitutional Zoning to Neutralize Adult Entertainment – Detroit to New York, 5 Fordham Urban L.J. 455, 472-74 (1977) (advocating one-year amortization period).

certiorari at 447 U.S. 929 (1980). And in Northend Cinema v. City of Seattle, 585 P.2d 1153 (Wash. 1978), a Seattle ordinance was upheld with a 90-day amortization period. Certiorari was denied sub nom. Apple Theatre v. City of Seattle at 441 U.S. 946 (1979).

The use of an amortization provision is a reasonable alternative to a grandfather clause, SDJ, Inc. v. City of Houston, 636 F.Supp. at 1370-71 (S.D. Tex. 1986), affirmed at 837 F.2d 1268 (5th Cir. 1988), and is but another application of traditional zoning principles to adult businesses. In City of Renton, this Court noted that cities may vary in the methods chosen to further the substantial interest in regulating these businesses. City of Renton, 89 L.Ed.2d at 41. While Detroit dispersed adult businesses, the City of Renton concentrated them. Similarly, while Detroit grandfathered existing businesses, the City of Dallas may choose to amortize them and require them to relocate within a reasonable period. So long as the Ordinance does not "unreasonably limit alternative avenues of communication," Young is satisfied.

#### CONCLUSION

The decision of the Fifth Circuit Court of Appeals is in harmony with this Court's decisions in Young, City of Renton and Arcara. This Court should deny the Petition for Writ of Certiorari.

Dated: July 12, 1988

Respectfully submitted,

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# REPLY BRIEF

EILED AUG 8 1986

IN THE

#### SUPREME COURT OF THE UNITED STATES October Term, 1987

No. 87-2012

FW/PBS, INC., et al., Petitioners

Y8.

THE CITY OF DALLAS, et al.,

Respondents

#### PETITIONERS' REPLY BRIEF

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#### IN THE SUPREME COURT OF THE UNITED STATES October Term, 1987

No. 87-2012

FW/PBS, INC., a Texas Corporation, d/b/a PARIS ADULT; BOOK-STORE II; FW/PBS, INC., a Texas Corporation, d/b/a PARIS ADULT VIDEO CENTER; FW/PBS, INC., a Texas Corporation, d/b/a FILMWORLD; DSB, INC., a Texas Corporation, d/b/a DENMARK BOOKSTORE; CHARLES E. CARLOCK, d/b/a PARIS ADULT BOOKSTORE 1; LONE STAR MULTI THE-ATRES, INC., a Texas Corporation, d/b/a NEW FINE ARTS ADULT THEATRE; LONE STAR MULTI THEATRES, INC., a Texas Corporation, d/b/a LA CAGE; BEVERLY K. VAN DUSEN d/b/a LONE STAR BOOKSTORE; BEVERLY K. VAN DUSEN, d/ b/a ELITE BOOKSTORE: BILL STATEN, JR., d/b/a ROYAL LANE BOOKSTORE; BILL STATEN, JR., d/b/a NEW VEN-TURE VIDEO; BILL STATEN, JR., d/b/a MOCKINGBIRD LANE NEWS; Bi-Ti ENTERPRISES, INC., d/b/a RED LETTER NEWS; GATTIE CORPORATION, d/b/a FANTASYLAND; GATTIE CORPORATION, d/b/a VIDEOLAND ARCADE; GATTIE COR-PORATION, d/b/a VIDEOSTOP; J.R.E. ENTERPRISES, d/b/a KAZBAH BOOKSTORE; ENTERTAINMENT UNLIMITED, d/ b/a EROS DALLAS.

VI

THE CITY OF DALLAS, a Texas Incorporated Municipality; A. STARKE TAYLOR, Mayor of the City of Dallas in his representative capacity only; BILLY PRINCE, Chief of Police of the City of Dallas, in his representative capacity only,

#### PETITIONERS' REPLY BRIEF

COME NOW the above-named Petitioners, by and through their attorneys, and respectfully tender this Reply Brief in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

#### ARGUMENT

I. THIS COURT'S RECENT DECISIONS IN CITY OF LAKEWOOD v. PLAIN DEALER PUBLISHING CO., No. 86-1042. U.S., 56 U.S.L.W. 4611 (June 17, 1988) AND RILEY v. NATIONAL FEDERATION OF THE BLIND, No. 87-328 U.S. 56 U.S.L.W. 4869 SUPPORT (JUNE 29, 1988) GRANTING OF THE PETITION FOR CERTIORARI

Since the filing of the Petition for Certiorari in the instant case, this Court has decided two cases which directly support the arguments previously advanced by Petitioner. In both City of Lakewood v. Plain Dealer Publishing Co., \_U.S. \_, 56 U.S.L.W. 4611 (June 17, 1988) and Riley v. National Federation of the Blind. \_U.S. \_, 56 U.S.L.W. 4869 (June 29, 1988), licensing laws regulating First Amendment activities were declared unconstitutional. Although Respondent City did not address these cases in its brief in opposition, both cases are significant to the instant case which involves a challenge to a licensing ordinance regulating protected First Amendment activity.

In City of Lakewood v. Plain Dealer Publishing Co., supra. the Court held that a periodic licensing ordinance regulating the placement of newsracks on public property violated the First Amendment since it vested unbridled discretion in government officials to permit or deny a license for expressive activity. The Court also noted that a lack of any requirement for speedy determination and appeal of licensing decisions could lead to a denial of expressive rights. 56 U.S.L.W. at 4617.

Three justices dissented primarily on the basis that placement of newsracks on public property is not an activity protected by the First Amendment. However, the dissent noted that First Amendment scrutiny would be appropriate where if the city sought to license the distribution of all newspapers in the City, or if it required licenses for all stores which sold newspapers.

56 U.S.L.W. at 4619. The dissent further noted that the existence of "ample alternative channels" for the distribution of newspapers through convenience stores or home delivery supported the licensing of one limited aspect of newspaper distribution. 56 U.S.L.W. at 4620-1.

In the instant case, the challenged Dallas ordinance indisputedly regulates the operation of businesses engaged in the
distribution of protected First Amendment expression. "[D]enial
of a license amounts to an absolute suppression of expression."

Dumas v. City of Dallas, 648 F.Supp. 1061, 1074 n. 37. No
"alternative avenues of communication" exist for a sexually
oriented business within the City of Dallas if a license is denied.
Thus, under both the majority and dissenting opinions in Plain
Dealer, the Dallas periodic licensing ordinance must be subjected
to heightened First Amendment analysis.

The Court's decision in Riley v. National Federation of the Blind of North Carolina. \_U.S. \_, 56 U.S.L.W. 4869, 4873 (June 29, 1988) further supports this principle. In Riley, the Court

declared a North Carolina charitable solicitation licensing statute violative of the First Amendment that: (1) placed specified limits on a reasonable fee a fundraiser could charge; (2) required disclosures to potential donors; and (3) did not require the issuance of a license within a specified brief period. The Court required that the licensing statute regulating First Amendment activity in Riley "must provide that the licensor will, within a specified brief period, either issue a license or go to court." Freedman v. Maryland, 380 U.S. 51, 59 (1965)."

Like the statute declared unconstitutional in Riley, the Dallas sexually oriented business licensing ordinances does not provide the procedural safeguards of Freedman v. Maryland. 380 U.S. 51 (1965). Contrary to the requirements of Riley and Freedman, the challenged Dallas ordinance places the burden on the licensee to seek review and go forward with proving the invalidity of the denial, suspension, or revocation of a license to engage in First Amendment activity. The challenged ordinance further fails to assure a prompt, final judicial determination. See National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977).

The recent decisions of this Court in <u>Plain Dealer</u> and <u>Riley</u> indicate that any licensing ordinance directly regulating First Amendment activities will be subjected to intense scrutiny. Based upon these new decisions together with arguments set forth previously, the Petition for Certiorari should be granted in the instant case.

Respondent City asserts that the time, place and manner analysis set forth in City of Renton v. Playtime Theatres. Inc. 475 U.S. 41 (1986) was properly applied by the Fifth Circuit in upholding the challenged ordinance. FW/PBS. Inc. v. City of Dallas. 8B7 F.2d 1298, 1304-5 (5th Cir. 1988). However, as noted by Judge Thornberry, in his opinion dissenting in part in FW/PBS. 837 F.2d at 1309, the fact that the challenged ordinance contains both zoning and licensing regulations does not justify the extension of the Renton time, place and manner analysis to a licensing ordinance that "completely prevents certain persons from speaking"

[N]othing in <u>Renton</u> supports the majority's severing of the time, place and manner standard from its proper context, and applying that standard to this licensing ordinance. This licensing ordinance has a far more substantial impact on speech than zoning because zoning leaves open alternative avenues of communication. The denial of a license is a complete ban on speech. <u>Id</u>.

Respondent City adopts the erroneous premise advanced by the Fifth Circuit's panel majority that <u>Renton</u> "held that sexually explicit materials deserve less first amendment protection than other kinds of speech." <u>Id.</u> at 1302. However, <u>Renton</u>

never held that differing levels of First Amendment protection existed in this area, but rather merely quoted the plurality opinion in Young v. American Mini Theatres. Inc., 427 U.S. 50, 70 (1976) in a footnote while reviewing the history of adult use zoning. As observed in Kev. Inc. v. Kitsap County, 753 F.2d 1053, 1058 (9th Cir. 1986), a majority of the justices in Young "concluded that the degree of protection the First Amendment affords speech does not vary with the social value ascribed to that speech by the courts. This view continues to govern." As Justice Powell stated in the Young concurring opinion, "I do not think we need reach, nor am I inclined to agree with, the holding . . . that nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression." 427 U.S. 50, 73 n. 1. Numerous other federal circuits have adopted this position of the five justices in Young. See United States v. Guarino, 729 F.2d 864, 868 n. 4 (1st Cir. 1984) (en banc); Avalon Cinema Corp. v. Thompson, 667 F.2d 659, 663 n. 10 (8th Cir. 1981) (en banc), Hart Bookstores, Inc. v. Edmisten, 612 F.2d 821, 826-828 (4th Cir. 1979) cert. denied, 447 U.S. 929 (1980). See also Pensack v. City and County of Denver, 630 F. Supp. 177, 180 (D. Colo. 1986).

Contrary to the assertion of Respondent, Petitioners do not "overlook" the decision in <u>Arcara v. Cloud Books. Inc.</u>, 478 U.S. \_\_, 92 L.Ed.2d 568, 106 S.Ct. 3175 (1986), but rather address

this case in detail. Petition for Certiorari, pp. 15-16. It is Respondent that overlooks the express language of Arcara. Unlike the situation in Arcara, the Dallas licensing ordinance inevitably singles out one type of expression for regulation that can result in the absolute prohibition of the ability to engage in First Amendment protected expression within the City of Dallas.

Respondent contends that this Court's decisions in <u>Vance</u> v. <u>Universal Amusement Co.</u>, 445 U.S. 308 (1980) and <u>Near v.</u> <u>Minnesots</u>, 283 U.S. 697 (1931) are not applicable to the instant case because those cases did not require a "judicial determination of obscenity prior to suppression." Respondent's Brief, p. 8. However, the issue in both <u>Vance</u> and <u>Near</u> was whether a prior restraint upon unspecified future publications could be imposed on the basis of past abuses of the right to expression. In <u>Vance</u>, the Court expressly stated that the fact "[t]hat a state trial judge might be thought more likely than an administrative censor to determine accurately that a work is obscene does not change the unconstitutional character of the restraint if erroneously entered." 445 U.S. 308, 317 (1980).

Respondent City brushes aside the prior restraint created by the ordinance by stating that the absolute denial of First Amendment rights caused by a denial or revocation of a license "is but a temporary occupational disability" that "does not bar the exhibition of any particular film or book." Respondent's

Brief, p. 8. The "temporary occupational disability" is, in fact, an absolute prior restraint on future expression more serious than those rejected by this Court in Near and Vance. A person convicted of a felony will be denied all ability to obtain a sexually oriented business license within the City of Dallas for five years after conviction. Section 41A-5(10)(B)(ii). A misdemeanor will cause a two year period in which a license will not be granted. In Vance, the court held that a one year injunction against the exhibition of unnamed obscene motion pictures at a single location constituted an impermissible prior restraint. Thus, the "temporary occupational disability" created by the challenged ordinance imposes a far more severe prior restraint than that struck down in Vance.

The fact that the Dallas sexually oriented business licensing ordinance imposes a prior restraint expression requires the procedural safeguards in <u>Freedman v. Maryland. supra.</u> and most recently in <u>Riley v. National Federal of the Blind. supra.</u> The fact that certain aspects of the ordinance may be content neutral does not justify ending all inquiry into provisions of the ordinance that cause a prior restraint. <u>See</u> discussion, <u>supra.</u>

Moreover, as discussed supra. non-obscene sexually explicit expression is entitled to full First Amendment protection. As noted by Judge Thornberry in his dissent, the suggestion by the panel majority that <u>Freedman</u> procedural safeguards are less

important when a prior restraint is imposed on a commercial enterprise "def[ies] common sense." FW/PBS v. City of Dallas. 837
F.2d at 1309. Judge Thornberry stated:

The majority is arguing that the more severe the infringement on a person's First Amendment rights, the less protection that person deserves. ... A government cannot avoid the constitutional procedures that safeguard an individual's rights merely by smothering the rights to such an extent that the individual is taunted into fighting back. This dangerous reasoning, which can only serve to encourage governments to impose the strongest possible burden on what they deem to be unacceptable speech, contravenes the precepts of the First Amendment. Id.

Respondent distinguishes the cases cited in the Petition on the basis that every case striking down licensing laws imposing prior restraints as speech involved content based regulation while the Dallas ordinance is content neutral. However, the City provides no basis for this distinction. Respondent further attempts to distinguish Freedman v. Maryland.supra. and several federal appellate cases cited by Petitioner on the basis that administrative, rather than judicial determination of obscenity would justify the denial or revocation of a license to present protected speech. As discussed supra, this Court in Vance expressly rejected the argument that a prior restraint entered by a judge was distinguishable from Freedman where an administrative board entered the restraint.

The challenged ordinance goes well beyond those previously invalidated by this Court this term in its threat to free expression. In order to protect the integrity of the First Amendment and maintain the consistent line of cases carefully crafted by this Court, the Petition for Certiorari should be granted.

Dated: August 8, 1988.

Respectfully submitted,

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# JOINT APPENDIX

Nos. 87-2012, 87-2051 and 88-49

APR 11 1909

In The

JOSEPH F. SPANIOL, JE

### Supreme Court of the United States

October Term, 1988

No. 87-2012 FW/PBS, INC., et al.,

V.

Petitioners,

CITY OF DALLAS, et al.,

Respondents.

No. 87-2051 M.J.R., INC., et al.,

V.

Petitioners,

CITY OF DALLAS, et al.,

Respondents.

No. 88-49 CALVIN BERRY, III, et al.,

V.

Petitioners,

CITY OF DALLAS, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals To The Fifth Circuit

JOINT APPENDIX

(All Counsel Listed on Inside Cover)

Petition for Certiorari in No. 87-2012 Filed June 8, 1988
Certiorari in No. 87-2012 on Issues I, II and III
Granted February 27, 1989
Petition for Certiorari in No. 87-2051 Filed June 13, 1988
Certiorari in No. 87-2051 on Issues I and II
Granted February 27, 1989
Petition for Certiorari in No. 88-49 Filed June 13, 1988
Certiorari in No. 88-49 Granted February 27, 1989

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6/30/86	Plaintiffs', FW/PBS, Inc., et al., Com- plaint for Declaratory Relief, Tempor- ary Restraining Order, Preliminary Injunction, Permanent Injunction and Attorneys Fees
6/30/86	Plaintiffs', FW/PBS, Inc., et al., Motion for Temporary Restraining Order and/ or Preliminary Injunction
7/9/86	Court's Order requiring parties to submit affidavits and/or depositions in determining Plaintiffs', FW/PBS, Inc., et al., request for preliminary injunction
7/15/86	Plaintiffs', M.J.R., Inc., et al., Original Complaint, Complaint for Declaratory Judgment, Complaint for Temporary Restraining Order, Complaint for Temporary Injunction, Complaint for Preliminary Injunction and Complaint for Permanent Injunction
7/15/86	Plaintiffs', M.J.R., Inc., et al., Motion for Temporary Restraining Order and Brief in support thereof
7/15/86	Plaintiffs', M.J.R., Inc., et al., Applica- tion for Preliminary Injunction
7/17/86	Plaintiffs', Calvin Berry, III, et al., Com- plaint for Declaratory Relief, Tempor- ary Restraining Order, Preliminary Injunction and Permanent Injunction
7/18/86	Court's Order of Transfer, transferring Plaintiffs', FW/PBS, Inc., et al., case to

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4/22/88	Petitioners', Calvin Berry, III, et al., Response to Application for Recall and Stay of Mandate of the United States Court of Appeals for the Fifth Circuit
5/4/88	Court's Order vacating Justice Byron R. White's temporary stay, granting Petitioners' application for stay and staying judgment of the United States
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6/13/88	Petitioners', M.J.R., Inc., et al., Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit
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8/10/88	Brief in Support of Petition for Writ of Certiorari
2/27/89	Petitioners', FW/PBS, Inc., et al., Petition for Writ of Certiorari is granted as to Questions I, II and III of Petition; Petitioners', M.J.R., Inc., et al., Petition for Writ of Certiorari is granted as to Questions 1 and 2; and Petitioners', Calvin Berry, III, et al., Petition for Writ of Certiorari is granted.

## UNITED STATES DISTRICT COURT Case No. CA3-86-1759-R

Order of Judgment and Memorandum Opinion, FW/PBS Inc., et al. v. City of Dallas, et al. (Printed as Appendix F to the Petition for Certiorari in Case No. 87-2012, pp. 39-70)

#### UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Case No. 86-1723

Opinion, FW/PBS, Inc. et al. v. City of Dallas, et al., (Printed as Appendix A to the Petition for Certiorari in Case No. 87-2012, pp. 1-30)

Denial of Petition for Rehearing and Suggestion for Rehearing En Banc (Printed as Appendix B to the Petition for Certiorari in Case No. 87-2012, pp. 31-32)

Denial of Petitioner's Motion for Stay of the Issuance of the Mandate pending filing of Petition for Writ of Certiorari (Printed as Appendix C to the Petition for Certiorari in Case No. 87-2012, pp. 33-36)

#### SUPREME COURT OF THE UNITED STATES

FW/PBS, Inc., dba Paris Adult Bookstore II, et al., v. City of Dallas, et al. No. 87-2012
M.J.R., Inc., et al., v. City of Dallas
No. 87-2051
Calvin Berry, III, et al., v. City of Dallas, et al. No. 88-49

February 27, 1989

The motion of Citizens For Decency Through Law, Inc. for leave to file a brief as amicus curiae in No. 87-2012 is granted. The petition for a writ of certiorari in No. 87-2012 is granted limited to Questions I, II and III presented by the petition. The petition for a writ of certiorari in No. 87-2051 is granted limited to Questions 1 and 2 presented by the petition. The petition for a writ of certiorari in No. 88-49 is granted. The cases are consolidated and a total of one hour is allotted for oral argument.

#### SEXUALLY ORIENTED BUSINESSES

#### CHAPTER 41A. SEXUALLY ORIENTED BUSINESSES

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SEC. 41A-2.	Definitions.
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#### CHAPTER 41A. SEXUALLY ORIENTED BUSINESSES

#### CHAPTER 41A-1. PURPOSE AND INTENT.

(a) It is the purpose of this chapter to regulate sexually oriented businesses to promote the health,

safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market.

(b) It is the intent of the city council that the locational regulations of Section 41A-13 of this chapter are promulgated pursuant to Article 2372w, Revised Civil Statutes of Texas, as they apply to nude model studios and sexual encounter centers only. It is the intent of the city council that all other provisions of this chapter are promulgated pursuant to the Dallas City Charter and Article 1175, Revised Civil Statutes of Texas. (Ord. 19196)

#### SEC. 41A-2. DEFINITIONS.

In this chapter:

(1) ADULT ARCADE means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing

of "specified sexual activities" or "specified anatomical areas."

- (2) ADULT BOOKSTORE or ADULT VIDEO STORE means a commercial establishment which as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following:
- (A) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which depict or describe "specified sexual activities" or "specified anatomical areas"; or
- (B) instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities."
- (3) ADULT CABARET means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:
  - (A) persons who appear in a state of nudity; or
- (B) live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or
- (C) films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description or "specified sexual activities" or "specified anatomical areas."
- (4) ADULT MOTEL means a hotel, motel or similar commercial establishment which:

- (A) offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; and has a sign visible from the public right of way which advertises the availability of this adult type of photographic reproductions; or
- (B) offers a sleeping room for rent for a period of time that is less than 10 hours; or
- (C) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than 10 hours.
- (5) ADULT MOTION PICTURE THEATER means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."
- (6) ADULT THEATER means a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities."
- (7) CHIEF OF POLICE means the chief of police of the city of Dallas or his designated agent.

- (8) ESCORT means a person who, for consideration, agrees or offers to act as a companion, guide, or date of another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.
- (9) ESCORT AGENCY means a person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes, for a fee, tip, or other consideration.
- (10) ESTABLISHMENT means and includes any of the following:
- (A) the opening or commencement of any sexually oriented business as a new business;
- (B) the conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;
- (C) the addition of any sexually oriented business to any other existing sexually oriented business; or
- (D) the relocation of any sexually oriented business.
- (11) LICENSEE means a person in whose name a license to operate a sexually oriented business has been issued, as well as the individual listed as an applicant on the application for a license.
- (12) NUDE MODEL STUDIO means any place where a person who appears in a state of nudity or displays "specified anatomical areas" is provided to be

observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration.

- (13) NUDITY or a STATE OF NUDITY means:
- (A) the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast; or
- (B) a state of dress which fails to opaquely cover a human buttock, anus, male genitals, female genitals, or areola of the female breast.
- (14) PERSON means an individual, proprietorship, partnership, corporation, association, or other legal entity.
- (15) RESIDENTIAL DISTRICT means a single family, duplex, townhouse, multiple family or mobile home zoning district as defined in the Dallas Development Code.
- (16) RESIDENTIAL USE means a single family, duplex, multiple family, or "mobile home park, mobile home subdivision, and campground" use as defined in the Dallas Development Code.
- (17) SEMI-NUDE means a state of dress in which clothing covers no more than the genitals, pubic region, and areolae of the female breast, as well as portions of the body covered by supporting straps or devices.
- (18) SEXUAL ENCOUNTER CENTER means a business or commercial enterprise that, as one of its primary business purposes, offers for any form of consideration:

- (A) physical contact in the form of wrestling or tumbling between persons of the opposite sex; or
- (B) activities between male and female persons and/or persons of the same sex when one or more of the persons is in a state of nudity or semi-nude.
- (19) SEXUALLY ORIENTED BUSINESS means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center.
- (20) SPECIFIED ANATOMICAL AREAS means human genitals in a state of sexual arousal.
- (21) SPECIFIED SEXUAL ACTIVITIES means and includes any of the following:
- (A) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;
- (B) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;
  - (C) masturbation, actual or simulated; or
- (D) excretory functions as part of or in connection with any of the activities set forth in (A) through (C) above.
- (22) SUBSTANTIAL ENLARGEMENT of a sexually oriented business means the increase in floor area occupied by the business by more than 25 percent, as the floor area exists on June 18, 1986.

- (23) TRANSFER OF OWNERSHIP OR CONTROL of a sexually oriented business means and includes any of the following:
  - (A) the sale, lease, or sublease of the business;
- (B) the transfer of securities which constitute a controlling interest in the business, whether by sale, exchange, or similar means; or
- (C) the establishment of a trust, gift, or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control. (Ord. Nos. 19196; 19377)

#### SEC. 41A-3. CLASSIFICATION.

Sexually oriented businesses are classified as follows:

- (1) adult arcades;
- (2) adult bookstores or adult video stores;
- (3) adult cabarets;
- (4) adult motels;
- (5) adult motion picture theaters;
- (6) adult theaters;
- (7) escort agencies;
- (8) nude model studios; and
- (9) sexual encounter centers. (Ord. 19196)

#### SEC. 41A-4. LICENSE REQUIRED.

- (a) A person commits an offense if he operates a sexually oriented business without a valid license, issued by the city for the particular type of business.
- (b) An application for a license must be made on a form provided by the chief of police. The application must be accompanied by a sketch or diagram showing the configuration of the premises, including a statement of total floor space occupied by the business. The sketch or diagram need not be professionally prepared but must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six inches. Applicants who must comply with Section 41A-19 of this chapter shall submit a diagram meeting the requirements of Section 41A-19.
- (c) The applicant must be qualified according to the provisions of this chapter and the premises must be inspected and found to be in compliance with the law by the health department, fire department, and building official.
- (d) If a person who wishes to operate a sexually oriented business is an individual, he must sign the application for a license as applicant. If a person who wishes to operate a sexually oriented business is other than an individual, each individual who has a 20 percent or greater interest in the business must sign the application for a license as applicant. Each applicant must be qualified under Section 41A-5 and each applicant shall be considered a licensee if a license is granted.

(e) The fact that a person possesses a valid theater license, dance hall license, or public house of amusement license does not exempt him from the requirement of obtaining a sexually oriented business license. A person who operates a sexually oriented business and possesses a theater license, public house of amusement license or dance hall license shall comply with the requirements and provisions of this chapter as well as the requirements and provisions of Chapter 46 and Chapter 14 of this code when applicable. (Ord. 19196)

#### SEC. 41A-5. ISSUANCE OF LICENSE.

- (a) The chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:
  - (1) An applicant is under 18 years of age.
- (2) An applicant or an applicant's spouse is overdue in his payment to the city of taxes, fees, fines, or penalties assessed against him or imposed upon him in relation to a sexually oriented business.
- (3) An applicant has failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form.
- (4) An applicant or an applicant's spouse has been convicted of a violation of a provision of this chapter, other than the offense of operating a sexually oriented business without a license, within two years

immediately preceding the application. The fact that a conviction is being appealed shall have no effect.

- (5) An applicant is residing with a person who has been denied a license by the city to operate a sexually oriented business within the preceding 12 months, or residing with a person whose license to operate a sexually oriented business has been revoked within the preceding 12 months.
- (6) The premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances.
- (7) The license fee required by this chapter has not been paid.
- (8) An applicant has been employed in a sexually oriented business in a managerial capacity within the preceding 12 months and has demonstrated that he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner, thus necessitating action by law enforcement officers.
- (9) An applicant or the proposed establishment is in violation of or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19 or 41A-20.
- (10) An applicant or an applicant's spouse has been convicted of a crime:

#### (A) involving:

(i) any of the following offenses as described in Chapter 43 of the Texas Penal Code:

- (aa) prostitution;
- (bb) promotion of prostitution;
- (cc) aggravated promotion of prostitution;
- (dd) compelling prostitution;
- (ee) pobscenity;
- (ff) sale, distribution, or display of harmful material to minor;
  - (gg) sexual performance by a child;
  - (hh) possession of child pornography;
- (ii) any of the following offenses as described in Chapter 21 of the Texas Penal Code:
  - (aa) public lewdness;
  - (bb) indecent exposure;
  - (cc) indecency with a child;
- (iii) sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;
- (iv) incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code; or
- (v) criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;

#### (B) for which:

 (i) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;

- (ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or
- (iii) Less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemeanor offenses or combination of misdemeanor offenses occurring within any 24-month period.
- (b) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or applicant's spouse.
- (c) An applicant who has been convicted or whose spouse has been convicted of an offense listed in Subsection (a)(10) may qualify for a sexually oriented business license only when the time period required by Section 41A-5(a)(10)(B) has elapsed.
- (d) The license, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, and the address of the sexually oriented business. The license shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time. (Ord. Nos. 19196; 19377)

#### SEC. 41A-6. FEES.

- (a) The annual fee for a sexually oriented business license is \$500.
- (b) If an applicant is required by this code to also obtain a dance hall license or public house of amusement license for the business at a single location, payment of the fee for the sexually oriented business license exempts the applicant from payment of the fees for the dance hall or public house of amusement licenses. (Ord. 19196)

#### SEC. 41A-7. INSPECTION.

- (a) An applicant or licensee shall permit representatives of the police department, health department, fire department, housing and neighborhood services department, and building inspection division to inspect the premises of a sexually oriented business for the purpose of insuring compliance with the law, at any time it is occupied or open for business.
- (b) A person who operates a sexually oriented business or his agent or employee commits an offense if he refuses to permit a lawful inspection of the premises by a representative of the police department at any time it is occupied or open for business.
- (c) The provisions of this section do not apply toareas of an adult motel which are currently being rented by a customer for use as a permanent or temporary habitation. (Ord. Nos. 19196; 19377)

#### SEC. 41A-8. EXPIRATION OF LICENSE.

- (a) Each license shall expire one year from the date of issuance and may be renewed only by making application as provided in Section 41A-4. Application for renewal should be made at least 30 days before the expiration date, and when made less than 30 days before the expiration date, the expiration of the license will not be affected.
- (b) When the chief of police denies renewal of a license, the applicant shall not be issued a license for one year from the date of denial. If, subsequent to denial, the chief of police finds that the basis for denial of the renewal license has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date denial became final. (Ord. 19196)

#### SEC. 41A-9. SUSPENSION.

The chief of police shall suspend a license for a period not to exceed 30 days if he determines that a licensee or an employee of a licensee has:

- (1) violated or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19, or 41A-20 of this chapter;
- (2) engaged in excessive use of alcoholic beverages while on the sexually oriented business premises;
- (3) refused to allow an inspection of the sexually oriented business premises as authorized by this chapter;
- (4) knowingly permitted gambling by any person on the sexually oriented business premises;

(5) demonstrated inability to operate or manage a sexually oriented business in a peaceful and law-abiding manner thus necessitating action by law enforcement officers. (Ord. 19196)

#### SEC. 41A-10. REVOCATION.

- (a) The chief of police shall revoke a license if a cause of suspension in Section 41A-9 occurs and the license has been suspended within the preceding 12 months.
- (b) The chief of police shall revoke a license if he determines that:
- a licensee gave false or misleading information in the material submitted to the chief of police during the application process;
- (2) a licensee or an employee has knowingly allowed possession, use, or sale of controlled substances on the premises;
- (3) a licensee or an employee has knowingly allowed prostitution on the premises;
- (4) a licensee or an employee knowingly operated the sexually oriented business during a period of time when the licensee's license was suspended;
- (5) a licensee has been convicted of an offense listed in Section 41A-5(a)(10)(A) for which the time period required in Section 41A-5(a)(10)(B) has not elapsed;

- (6) on two or more occasions within a 12-month period, a person or persons committed an offense occurring in or on the licensed premises of a crime listed in Section 41A-5(a)(10)(A), for which a conviction has been obtained, and the person or persons were employees of the sexually oriented business at the time the offenses were committed;
- (7) a licensee or an employee has knowingly allowed any act of sexual intercourse, sodomy, oral copulation, masturbation or sexual contact to occur in or on the licensed premises. The term "sexual contact" shall have the same meaning as it is defined in Section 21.01, Texas Penal Code; or
- (8) a licensee is delinquent in payment to the city for hotel occupancy taxes, ad valorem taxes, or sales taxes related to the sexually oriented business.
- (c) The fact that a conviction is being appealed shall have no effect on the revocation of the license.
- (d) Subsection (b)(7) does not apply to adult motels as a ground for revoking the license unless the licensee or employee knowingly allowed the act of sexual intercourse, sodomy, oral copulation, masturbation, or sexual contact to occur in a public place or within public view.
- (e) When the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a sexually oriented business license for one year from the date revocation became effective. If, subsequent to revocation, the chief of police finds that the basis for the revocation has been corrected or abated, the applicant may be granted a license if at least 90 days have

elapsed since the date the revocation became effective. If the license was revoked under Subsection (b)(5), an applicant may not be granted another license until the appropriate number of years required under Section 41A-5(a)(10)(B) has elapsed. (Ord. Nos. 19196; 19377)

#### SEC. 41A-11. APPEAL.

If the chief of police denies the issuance of a license, or suspends or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action and the right to an appeal. The aggrieved party may appeal the decision of the chief of police to a permit and license appeal board in accordance with Section 2-96 of this code. The filing of an appeal stays the action of the chief of police in suspending or revoking a license until the permit and license appeal board makes a final decision. If within a 10 day period the chief of police suspends, revokes, or denies issuance of a dance hall license or public house of amusement license for the same location involved in the chief's actions on the sexually oriented business license, then the chief may consolidate the requests for appeals of those actions into one appeal. (Ord. 19196)

#### SEC. 41A-12. TRANSFER OF LICENSE.

A licensee shall not transfer this license to another, nor shall a licensee operate a sexually oriented business under the authority of a license at any place other than the address designated in the application. (Ord. 19196)

### SEC. 41A-13. LOCATION OF SEXUALLY ORIENTED BUSINESSES.

- (a) A person commits an offense if he operates or causes to be operated a sexually oriented business within 1,000 feet of:
  - (1) a church;
- (2) a public or private elementary or secondary school;
- (3) a boundary of a residential district as defined in this chapter;
- (4) a public park adjacent to a residential district as defined in this chapter; or
- (5) the property line of a lot devoted to a residential use as defined in this chapter.
- (b) A person commits an offense if he causes or permits the operation, establishment, substantial enlargement, or transfer of ownership or control of a sexually oriented business within 1,000 feet of another sexually oriented business.
- (c) A person commits an offense if he causes or permits the operation, establishment, or maintenance of more than one sexually oriented business in the same building, structure, or portion thereof, or the increase of floor area of any sexually oriented business in any building, structure, or portion thereof containing another sexually oriented business.
- (d) For the purposes of Subsection (a), measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion

of the building or structure used as a part of the premises where a sexually oriented business is conducted, to the nearest property line of the premises of a church or public or private elementary or secondary school, or to the nearest boundary of an affected public park, residential district, or residential lot.

- (e) For purposes of Subsection (b) of this section, the distance between any two sexually oriented businesses shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which each business is located.
- (f) Any sexually oriented business lawfully operating on June 18, 1986, that is in violation of Subsections (a), (b), or (c) of this section shall be deemed a nonconforming use. The nonconforming use will be permitted to continue for a period not to exceed three years, unless sooner terminated for any reason or voluntarily discontinued for a period of 30 days or more. Such nonconforming uses shall not be increased, enlarged, extended or altered except that the use may be changed to a conforming use. If two or more sexually oriented businesses are within 1,000 feet of one another and otherwise in a permissible location, the sexually oriented business which was first established and continually operating at a particular location is the conforming use and the later-established business(es) is nonconforming.
- (g) A sexually oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the location, subsequent to the grant or renewal of the sexually oriented business license, of a church, public or

private elementary or secondary school, public park, residential district, or residential lot within 1,000 feet of the sexually oriented business. This provision applies only to the renewal of a valid license, and does not apply when an application for a license is submitted after a license has expired or has been revoked. (Ord. Nos. 19196; 19377)

### SEC. 41A-14. EXEMPTION FROM LOCATION RESTRICTIONS.

- (a) If the chief of police denies the issuance of a license to an applicant because the location of the sexually oriented business establishment is in violation of Section 41A-13 of this chapter, then the applicant may, not later than 10 calendar days after receiving notice of the denial, file with the city secretary a written request for an exemption from the locational restrictions of Section 41A-13.
- (b) If the written request is filed with the city secretary within the 10-day limit, a permit and license appeal board, selected in accordance with Section 2-95 of this code, shall consider the request. The city secretary shall set a date for the hearing within 60 days from the date the written request is received.
- (c) A hearing by the board may proceed if at least two of the board members are present. The board shall hear and consider evidence offered by any interested person. The formal rules of evidence do not apply.
- (d) The permit and license appeal board may, in its discretion, grant an exemption from the locational restrictions of Section 41A-13 if it makes the following findings:

- that the location of the proposed sexually oriented business will not have a detrimental effect on nearby properties or be contrary to the public safety or welfare;
- (2) that the granting of the exemption will not violate the spirit and intent of this chapter of the city code;
- (3) that the location of the proposed sexually oriented business will not downgrade the property values or quality of life in the adjacent areas or encourage the development of urban blight;
- (4) that the location of an additional sexually oriented business in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any efforts of urban renewal or restoration; and
- (5) that all other applicable provisions of this chapter will be observed.
- (e) The board shall grant or deny the exemption by a majority vote. Failure to reach a majority vote shall result in denial of the exemption. Disputes of fact shall be decided on the basis of a preponderance of the evidence. The decision of the permit and license appeal board is final.
- (f) If the board grants the exemption, the exemption is valid for one year from the date of the board's action. Upon the expiration of an exemption, the sexually oriented business is in violation of the locational restrictions of Section 41A-13 until the applicant applies for and receives another exemption.

- (g) If the board denies the exemption, the applicant may not re-apply for an exemption until at least 12 months have elapsed since the date of the board's action.
- (h) The grant of an exemption does not exempt the applicant from any other provisions of this chapter other than the locational restrictions of Section 41A-13. (Ord. 19196)

## SEC. 41A-15. ADDITIONAL REGULATIONS FOR ESCORT AGENCIES.

- (a) An escort agency shall not employ any person under the age of 18 years.
- (b) A person commits an offense if he acts as an escort or agrees to act as an escort for any person under the age of 18 years. (Ord. 19196)

## SEC. 41A-16. ADDITIONAL REGULATIONS FOR NUDE MODEL STUDIOS.

- (a) A nude model studio shall not employ any person under the age of 18 years.
- (b) A person under the age of 18 years commits an offense if he appears in a state of nudity in or on the premises of a nude model studio. It is a defense to prosecution under this subsection if the person under 18 years was in a restroom not open to public view or persons of the opposite sex.
- (c) A person commits an offense if he appears in a state of nudity or knowingly allows another to appear in a state of nudity in an area of a nude model studio

premises which can be viewed from the public right of way.

(d) A nude model studio shall not place or permit a bed, sofa, or mattress in any room on the premises, except that a sofa may be placed in a reception room open to the public. (Ord. 19196)

# SEC. 41A-17. ADDITIONAL REGULATIONS FOR ADULT THEATERS AND ADULT MOTION PICTURE THEATERS.

- (a) The requirements and provisions of Chapter 46 of this code remain applicable to adult theaters and adult motion picture theaters.
- (b) A person commits an offense if he knowingly allows a person under the age of 18 years to appear in a state of nudity in or on the premises of an adult theater or adult motion picture theater.
- (c) A person under the age of 18 years commits an offense if he knowingly appears in a state of nudity in or on the premises of an adult theater or adult motion picture theater.
- (d) It is a defense to prosecution under Subsections (b) and (c) of this section if the person under 18 years was in a restroom not open to public view or persons of the opposite sex. (Ord. 19196)

## SEC. 41A-18. ADDITIONAL REGULATIONS FOR ADULT MOTELS.

(a) Evidence that a sleeping room in a hotel, motel, or similar commercial establishment has been rented and

vacated two or more times in a period of time that is less than 10 hours creates a rebuttable presumption that the establishment is an adult motel as that term is defined in this chapter.

- (b) A person commits an offense if, as the person in control of a sleeping room in a hotel, motel, or similar commercial establishment that does not have a sexually oriented business license, he rents or subrents a sleeping room to a person and, within 10 hours from the time the room is rented, he rents or subrents the same sleeping room again.
- (c) For purposes of Subsection (b) of this section, the terms "rent" or "subrent" mean the act of permitting a room to be occupied for any form of consideration. (Ord. 19196)

# SEC. 41A-19: REGULATIONS PERTAINING TO EXHIBITION OF SEXUALLY EXPLICIT FILMS OR VIDEOS.

- (a) A person who operates or causes to be operated a sexually oriented business, other than an adult motel, which exhibits on the premises in a viewing room of less than 150 square feet of floor space, a film, video cassette, or other video reproduction which depicts specified sexual activities or specified anatomical areas, shall comply with the following requirements:
- (1) Upon application for a sexually oriented business license, the application shall be accompanied by a diagram of the premises showing a plan thereof specifying the location of one or more manager's stations and

the location of all overhead lighting fixtures and designating any portion of the premises in which patrons will not be permitted. A manager's station may not exceed 32 square feet of floor area. The diagram shall also designate the place at which the permit will be conspicuously posted, if granted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however each diagram should be oriented to the north or to some designated street or object and should be drawn to a designated scale or with marked dimensions sufficient to show the various internal dimensions of all areas of the interior of the premises to an accuracy of plus or minus six inches. The chief of police may waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the configuration of the premises has not been altered since it was prepared.

- (2) The application shall be sworn to be true and correct by the applicant.
- (3) No alteration in the configuration or location of a managers's station may be made without the prior approval of the chief of police or his designee.
- (4) It is the duty of the owners and operator of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.
- (5) The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manger's station of every area of the premises to which any patron is permitted access for any purpose

excluding restrooms. Restrooms may not contain video reproduction equipment. If the premises has two or more manager's stations designated, then the interior of the premises shall be configured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose from at least one of the manager's stations. The view required in this subsection must be by direct line of sight from the manager's station.

- (6) It shall be the duty of the owners and operator, and it shall also be the duty of any agents and employees present in the premises to ensure that the view area specified in Subsection (5) remains unobstructed by any doors, walls, merchandise, display racks or other materials at all times that any patron is present in the premises and to ensure that no patron is permitted access to any area of the premises which has been designated as an area in which patrons will not be permitted in the application filed pursuant to Subsection (1) of this section.
- (7) The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than one (1.0) footcandle as measured at the floor level.
- (8) It shall be the duty of the owners and operator and it shall also be the duty of any agents and employees present in the premises to ensure that the illumination described above, is maintained at all times that any patron is present in the premises.

(b) A person having a duty under Subsections (1) through (8) of subsection (a) above commits an offense if he knowingly fails to fulfill that duty. (Ord. 19196)

### SEC. 41A-20. DISPLAY OF SEXUALLY EXPLICIT MATERIAL TO MINORS.

- (a) A person commits an offense if, in a business establishment open to persons under the age of 17 years, he displays a book, pamphlet, newspaper, magazine, film, or video cassette, the cover of which depicts, in a manner calculated to arouse sexual lust or passion for commercial gain or to exploit sexual lust or perversion for commercial gain, any of the following:
- human sexual intercourse, masturbation, or sodomy;
- (2) fondling or other erotic touching of human genitals, pubic region, buttocks, or female breasts;
- (3) less than completely and opaquely covered human genitals, buttocks, or that portion of the female breast below the top of the areola; or
- (4) human male genitals in a discernibly turgid state, whether covered or uncovered.
- (b) In this section "display" means to locate an item in such a manner that, without obtaining assistance from an employee of the business establishment:
- (1) it is available to the general public for handling and inspection; or
- (2) the cover or outside packaging on the item is visible to members of the general public. (Ord. 19196)

#### SEC. 41A-21. ENFORCEMENT.

- (a) Except as provided by Subsection (b), any person violating Section 41A-13 of this chapter, upon conviction, is punishable by a fine not to exceed \$2,000.
- (b) If the sexually oriented business involved is a nude model studio or sexual encounter center, then violation of Section 41A-4(a) or 41A-13 of this chapter is punishable as a Class B misdemeanor.
- (c) Except as provided by Subsection (b), any person violating a provision of this chapter other than Section 41A-13, upon conviction, is punishable by a fine not to exceed \$500.
- (d) It is a defense to prosecution under Section 41A-4(a), 41A-13, or 41A-16(d) that a person appearing in a state of nudity did so in a modeling class operated:
- by a proprietary school licensed by the state of Texas; a college, junior college, or university supported entirely or partly by taxation;
- (2) by a private college or university which maintains and operates educational programs in which credits are transferrable to a college, junior college, or university supported entirely or partly by taxation; or

#### (3) in a structure:

- (A) which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing; and
- (B) where in order to participate in a class a student must enroll at least three days in advance of the class; and

- (C) where no more than one nude model is on the premises at any one time.
- (e) It is a defense to prosecution under Section 41A-4(a) or Section 41A-13 that each item of descriptive, printed, film, or video material offered for sale or rental, taken as a whole, contains serious literary, artistic, political, or scientific value. (Ord. Nos. 19196; 19963)

#### SEC. 41A-22. INJUNCTION.

A person who operates or causes to be operated a sexually oriented business without a valid license or in violation of Section 41A-13 of this chapter is subject to a suit for injunction as well as prosecution for criminal violations. (Ord. 19196)

#### SEC. 41A-23. AMENDMENT OF THIS CHAPTER.

Sections 41A-13 and 41A-14 of this chapter may be amended only after compliance with the procedure required to amend a zoning ordinance. Other sections of this chapter may be amended by vote of the city council. (Ord. 19196)

#### ARTICLE IX. PERMIT AND LICENSE APPEAL BOARD

- SEC. 2-95. PERMIT AND LICENSE APPEAL BOARD CREATED; FUNCTION; TERMS; HEARING PANELS.
- (a) There is hereby created the permit and license appeal board of the city, which shall be composed of 12 members appointed by the city council.
- (b) The permit and license appeal board shall hear appeals filed in accordance with Section 2-96 of this chapter.
- (c) All members shall be appointed for a term to expire on September 1, 1985. Subsequent appointments shall be made in August of odd-numbered years for a two year term beginning on September 1. All members shall serve until their successors are appointed and qualified.
- (d) The city secretary shall divide the board into four hearing panels for the purpose of performing the duties of the board. The city secretary shall assign cases to the hearing panels on a rotating basis. Each hearing panel has the same authority as the full board. A decision by a hearing panel constitutes a decision by the board. (Ord. 18200)

#### SEC. 2-96. APPEALS FROM ACTIONS OF DEPART-MENT DIRECTORS.

(a) If the director of a city department denies, suspends, or revokes a license or permit over which he has regulatory authority, and no appeal is provided by ordinance to another city board, the action is final unless the applicant, licensee, or permittee files a written appeal to the permit and license appeal board with the city secretary within 10 calendar days after the date of receiving notice of the director's action.

- (b) If a written request for an appeal hearing is filed with the city secretary within the 10 day limit, a permit and license appeal board, selected in accordance with Section 2-95 of this chapter, shall hear the appeal. The city secretary shall set a date for the hearing within 60 days from the date of the appeal. The permit and license appeal board shall hear and consider evidence offered by any interested person. The formal rules of evidence do not apply.
- (c) The permit and license appeal board shall decide the appeal on the basis of a preponderance of the evidence presented at the hearing if there is a dispute of fact, otherwise the board shall decide the appeal in accordance with the provisions of this code. The board shall affirm, reverse, or modify the action of the director by a majority vote. Failure to reach a majority decision on a motion shall leave the director's decision unchanged. A hearing of a permit and license appeal board may proceed if at least two of the board members are present. The decision of the permit and license appeal board is final. (Ord. 18200)

Sec. 2-97.-2-100. RESERVED

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#### DALLAS DEVELOPMENT CODE ARTICLE I

TITLE, PURPOSE, ENFORCEMENT, CERTIFICATE OF OCCUPANCY, FEES, NOTIFICATION SIGNS SEC. 51-1.101. TITLE.

This chapter is known as the Dallas Development Code.

#### SEC. 51-1.102. PURPOSE.

The regulations in this chapter have been established in accordance with a comprehensive plan for the purpose of promoting the health, safety, morals, and general welfare of the city in order to:

- (1) lessen the congestion in the streets;
- (2) secure safety from fire, flooding, and other dangers;
  - (3) provide adequate light and air;
  - (4) prevent the overcrowding of land;
  - (5) avoid undue concentration of population;
- (6) facilitate the adequate provision of transportation, water, sewage, schools, parks, and other public requirements;
  - (7) promote the character of areas of the city;
- (8) limit the uses in areas of the city that are peculiarly suitable for particular uses;
  - (9) conserve the value of buildings; and
- (10) encourage the most appropriate use of land throughout the city.

#### SEC. 51-1.103. ENFORCEMENT.

- (a) Criminal prosecution.
- (1) A person who violates any provision of this chapter is guilty of a separate offense for each day or portion of a day during which the violation is continued. Each offense is punishable by a fine not to exceed \$1,000.
- (2) A person is criminally responsible for a violation of this chapter if:
- (A) the person commits the violation or assists in the commission of the violation; or
- (B) the person owns part or all of the land or a structure on the land where the violation exists.
- (3) A person may not use land or a structure on land located in the city for other than those uses designated as permitted uses in accordance with the provisions of this chapter.
- (4) It is a defense to prosecution under this chapter that a person is in compliance with an order of the board of adjustment that specifically authorizes otherwise unlawful conduct.
- (b) Civil action. This chapter may be enforced through civil court action as provided by state law.
- (c) Utility disconnection. The building official may order city or private utilities to be disconnected upon failure to comply with this chapter or the building laws.
- (d) Enforcement authority. This chapter may be enforced by the building official or any other representative of the city. (Ord. 18001)

#### SEC. 51-1.104. CERTIFICATE OF OCCUPANCY.

#### (a) Certificate of occupancy required.

- (1) Except for the single-family and duplex uses, a person shall not use or change the use of a building, a portion of a building, or land without obtaining a certificate of occupancy from the building official.
- (2) A person shall submit an application for a certificate of occupancy on a form approved by the building official either:
- (A) at the time of application for a building permit if there is new construction; or
- (B) before occupancy and connection of utilities if there is a change of use.
- (3) The building official shall not issue a certificate of occupancy until all applicable codes and ordinances have been complied with.

#### (b) Record of certificates of occupancy.

- (1) The building official shall maintain a record of all certificates of occupancy.
- (2) Upon request and payment of the fee, a person may obtain copies of the certificate of occupancy issued for a building or land.

#### SEC. 51-1.105. FEES.

- (a) Fees for zoning amendments.
- An application will not be processed until the fee has been paid.
- (2) The applicant shall pay the filing fee to the director. The director shall deliver fees received to the controller on the next business day following receipt of the fees.
- (3) The refund of all or part of an application fee is controlled by Section 51-4.701(f).

#### SEC. 51-3.102. BOARD OF ADJUSTMENT.

(a) Creation; Membership; Appointment. There is hereby created the board of adjustment which shall consist of five members who are residents of the city. Members are appointed by the city council for two-year terms ending on September 1 of odd-numbered years and shall serve until their successors are appointed and qualified. A vacancy for the unexpired term of any member will be filled in the same manner as the original appointment was made. The city council may appoint four alternate members to the board who serve in the absence of one or more regular members when requested to do so by the chairman or by the city manager. The alternate members serve for the same period and are subject to removal the same as regular members. The city council shall fill vacancies occuring in the alternate membership the same as in the regular membership.

- (b) Quorum and Voting. Cases must be heard by a minimum number of five members of the board. The concurring vote of four members is necessary to decide any matter. Each member who is present and entitled to vote shall vote in accordance with Chapter 8 of this Code.
- (c) Powers and Duties. The board has the following powers and duties which must be exercised in accordance with this chapter:
- to hear and decide appeals from decisions of the building official made in the enforcement of this chapter;
- (2) to interpret the intent of the zoning district map when uncertainty exists because the actual physical features differ from those indicated on the zoning district map and when the rules set forth in the zoning district boundary regulations do not apply;
- (3) to hear and decide special exceptions that are expressly provided for in this chapter;
- (4) to bring about the discontinuance of a nonconforming use under a plan whereby the full value of the structure can be amortized within a definite time period;
- (5) to hear and decide requests for change of occupancy of a nonconforming use to another nonconforming use;
- (6) to hear and decide requests for the enlargement of a nonconforming use;
- (7) to hear and decide requests for reconstruction of a nonconforming structure on the land occupied by the structure when the reconstruction will not permanently

prevent the return of the property to a conforming use and will not increase the nonconformity;

- (8) to require the vacation and demolition of a nonconforming structure that is determined to be obsolete, dangerous, dilapidated, or substandard;
- (9) to consider on its own motion or upon the request of interested property owners, the operation or alteration of any use which is a nonconforming use because of its noncompliance with the environmental performance standards set forth in this chapter, and to specify the conditions and standards which must be complied with for continuance of the nonconforming use;
- (10) to grant variances from the front yard, side yard, rear yard, lot width, lot depth, coverage, floor area ratios, height, minimum sidewalks, off-street parking or off-street loading, or visibility obstruction regulations "that will not be contrary to the public interest when, owing to special conditions, a literal enforcement of this chapter would result in unnecessary hardship, and so that the spirit of the ordinance will be observed and substantial justice done. The variance must be necessary to permit development of a specific parcel of land which differs from other parcels of land by being of such a restrictive area, shape, or slope that it cannot be developed in a manner commensurate with the development upon other parcels of land in districts with the same zoning classification. A variance may not be granted to relieve a self created or personal hardship, nor for financial reasons only, nor may a variance be granted to permit any person a privilege in developing a parcel of land not

permitted by this chapter to other parcels of land in districts with the same zoning classification.

#### (d) Meetings, Records and Rules.

- (1) All meetings and hearings of the board must be open to the public in accordance with the Texas Open Meetings Act, Article 6252-17, Vernon's Texas Civil Statutes.
- (2) All records of the board are public records open to inspection at reasonable times and upon reasonable notice in accordance with the Texas Open Records Act, Article 6252-17a, Vernon's Texas Civil Statutes.
- (3) The board shall adopt rules not inconsistent with this code or state law to govern its proceedings.

#### (e) Effect of Decisions.

The board's decision is final unless appealed to the district court within 10 days in accordance with Article 1011g, Vernon's Texas Civil Statutes.

### SEC. 51-3.104. DEPARTMENT OF PLANNING AND DEVELOPMENT.

(a) Creation; Membership; Appointment. There is hereby created the department of planning and development consisting of the director of planning and development and such assistants and employees as the city council may provide for upon the recommendation of the city manager. The director shall be appointed by the city manager.

- (b) Powers and Duties. The director shall perform the following duties and have the following powers:
- advise the city manager on matters affecting the urban design and physical development of the city;
- (2) develop and recommend to the city manager a comprehensive plan for the city;
- (3) review and make recommendations regarding proposed actions implementing the comprehensive plan;
- (4) participate in the preparation and revision of the capital improvement program;
- (5) administer the regulations governing the subdivision and platting of land in accordance with state and local laws;
- (6) coordinate all planning relating to urban redevelopment, urban rehabilitation, and conservation intended to alleviate or prevent slums, obsolescence, blight, or other conditions of urban deterioration;
- (7) give advice and provide staff assistance to the board of adjustment and the plan and zoning commission in the exercise of their responsibilities;
- (8) perform all other duties required of him by the city manager or by ordinance. (Ord. Nos. 17226; 17393)

#### SEC. 51-3.105. BUILDING OFFICIAL.

- (a) Powers and Duties.
- The building official shall issue permits in accordance with this chapter.

- (2) The building official shall issue certificates of occupancy in accordance with this chapter.
- (3) The building official has the authority to enforce the provisions of this chapter.

#### SEC. 51-7.705. DETERMINATION OF NONCOMMER-CIAL MESSAGES.

- (a) Findings. The city council finds that it may be necessary in the enforement of this article to determine whether the message displayed upon a sign is a commercial message or a noncommercial message.
- (b) Hearing. If a person receives a notice of violations or is cited for maintaining an illegal sign, and the person notifies the city attorney in writing within 10 days of receiving the notice or citation that he believes the sign displays a noncommercial message and is, therefore, not in violation of this article, the city attorney shall postpone prosecution of the case and shall have the matter placed on the agenda of the sign control board of adjustment for appeal under Section 51-7.703(e) of this article. The board shall give the person maintaining the sign 10 days written notice of a public hearing on the matter. After hearing the evidence, the board shall decide whether the message displayed on the sign is commercial or noncommercial. No fee may be charged for this appeal.
- (c) Judicial Review. If the board decides that the message is commercial and that the sign is illegal, the person maintaining the sign may within 10 days of the board's decision file a notice of nonacceptance of the decision with the city attorney. Within three days after receiving

notice of nonacceptance, the city attorney shall initiate suit in the district court for determination that the sign is commercial and for an injunction to prohibit display of the sign in violation of this article. The city shall bear the burden of showing that the sign is commercial. In computing the three-day time period, Saturdays, Sundays, and legal holidays are excluded.

(d) When the tenure of the sign control board of adjustment expires, hearings under Subsection (b) will be before the board of adjustment. (Ord. 18202)

#### CHAPTER 6A

#### AMUSEMENT CENTERS

Sec. 6A-1. Defini	tion	S
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Sec. 6A-2. License required.

Sec. 6A-3. Reserved.

Sec. 6A-4. License application.

Sec. 6A-5. Fee.

Sec. 6A-6. License display, replacement, and transferability.

Sec. 6A-7. Refusal to issue or renew license.

Sec. 6A-8. License revocation.

Sec. 6A-9. Appeal from refusal to issue or renew license; from decision to revoke license.

Sec. 6A-10. Hours of operation.

Sec. 6A-11. Responsibility of licensee.

#### SEC. 6A-1. DEFINITIONS.

#### In this chapter:

- (1) AMUSEMENT CENTER means a business establishment in which at least 25 percent of the public floor area is devoted to coin-operated amusement devices and their public use. If a billiard hall, as defined in Chapter 9A of this code, occupies a portion of a business establishment, the billiard hall floor area shall not be included in determining the total public floor area of the establishment.
- (2) COIN-OPERATED AMUSEMENT DEVICE means a machine or device operated by insertion of a coin, token or similar object, for the purpose of amusement or skill. This term does not include:
  - (A) musical devices;
  - (B) billiard tables;

- (C) machines designed exclusively for children;
   or
- (D) devices designed to train persons in athletic skills or golf, tennis, baseball, archery, or other similar sports.
- (3) CHIEF OF POLICE means the chief of police of the city of Dallas or his designated agent.
- (4) LICENSEE means a person licensed to operate an amusement center.
- (5) OPERATOR means a person who manages or controls an amusement center.
- (6) PERSON means an individual, assumed name entity, partnership, joint-venture, association, or other legal entity. (Ord. 14736; Ord. 14932)

#### SEC. 6A-2. LICENSE REQUIRED.

No person may operate an amusement center in the city without first obtaining a license from the chief of police. (Ord. 14736)

#### SEC. 6A-3. RESERVED.

(Repealed by Ord. 14932)

#### SEC. 6A-4. LICENSE APPLICATION.

(a) An applicant for a license shall file with the chief of police a written application on a form provided for that purpose, which shall be signed by the applicant, who shall be the owner of the amusement center. Should

an applicant maintain an amusement center at more than one location, a separate application must be filed for each location. The following information is required in the application:

- (1) Name, address, and telephone number of the applicant, including the trade name by which applicant does business and the street address of the amusement center, and if incorporated, the name registered with the Secretary of State;
- (2) Name, address, and telephone number of the operator of the amusement center and proof that the operator is at least 18 years of age;
- (3) Whether the applicant, operator, and, if applicable, any corporate officer of the applicant has been convicted of a felony or within the preceding five years of an offense involving drugs, gambling, prostitution, obscenity, or unlawfully carrying a weapon;
- (4) The previous occupation of the applicant, operator, and, if applicable, all corporate officers of the applicant within the preceding five years;
- (5) Whether a previous license of applicant, or, if applicable, corporate officer of applicant has been revoked within two years of filing of the application;
- (6) Number of coin-operated amusement devices in the center; and
- (7) A statement that all the facts contained in the application are true.

- (b) The chief of police may require additional information of an applicant or licensee to clarify items on the application.
- (c) No applicant may maintain an amusement center in violation of the comprehensive zoning ordinance of the city. (Ord. 14736; Ord. 14932)

#### SEC. 6A-5. FEE.

The annual fee for an amusement center license is \$7.50 for each coin-operated amusement device located in the center. Amusement center licenses expire one year from the date of issuance. The fee for issuing a replacement license for one lost, destroyed, or mutilated is \$2. The fee is payable to the department of revenue and taxation upon approval of the license by the chief of police. No refund of license fees will be made. (Ord. 14736)

### SEC. 6A-6. LICENSE DISPLAY, REPLACEMENT, AND TRANSFERABILITY.

- (A) Each license issued pursuant to this article must be posted and kept in a conspicuous place in the amusement center and must state the number of coin-operated amusement devices for which the license was issued.
- (b) A replacement license may be issued for one lost, destroyed, or mutilated, upon application on a form provided by the chief of police. A replacement license shall have the word "REPLACEMENT" stamped across its face and shall bear the same number as the one it replaces.

- (c) An amusement center license is not assignable or transferable.
- (d) A licensee shall notify the chief of police within 10 days of a change or partial change in the ownership or management of the amusement center, or a change of address or trade name. (Ord. 14736)

#### SEC. 6A-7. REFUSAL TO ISSUE OR RENEW LICENSE.

The chief of police shall refuse to approve issuance or renewal of an amusement center license for one or more of the following reasons:

- A false statement as to a material matter made in an application for a license;
- (2) Conviction of the applicant, his operator, or corporate officer of the applicant of a felony or within the preceding five years of an offense involving drugs, gambling, prostitution, obscenity, or unlawfully carrying a weapon; or
- (3) Revocation of a license, pursuant to this chapter, of the applicant or corporate officer of the applicant within two years preceding the filing of the application. (Ord. 14736; Ord. 14932)

#### SEC. 6A-8. LICENSE REVOCATION.

- (a) The chief of police shall revoke an amusement center license for one or more of the following reasons:
- A false statement as to a material matter made in an application for a license, license renewal or a hearing concerning the license;

- (2) Conviction of the licensee, his operator, or corporate officer of the licensee of a felony or an offense involving drugs, gambling, prostitution, obscenity, or unlawfully carrying a weapon.
- (3) Conviction twice within a one year period of the licensee or his operator for a violation of the hours of operation provision of this chapter;
- (4) Employment by the licensee of an operator who is under 13 years of age;
- (5) Operation of an amusement center containing more coin-operated amusement devices than the center is licensed for; or
- (6) Violation by the licensee or his operator of Section 6A-11 of this chapter.
- (b) The chief of police shall send written notice of revocation to a licensee by certified mail, return receipt requested, setting forth the reasons for the revocation. (Ord. 14736; Ord. 14932)

# SEC. 6A-9. APPEAL FROM REFUSAL TO ISSUE OR RENEW LICENSE; FROM DECISION TO REVOKE LICENSE.

If the chief of police refuses to approve the issuance of a license or the renewal of a license to an applicant, or revokes a license issued to a licensee under this article, this action is final unless the applicant or licensee, within 10 days after the receipt of written notice of the action, files with the city manager a written appeal. The city manager shall, within 10 days after the appeal is filed, consider all the evidence in support of or against the

action appealed, and render a decision either sustaining or reversing the action. If the city manager sustains the action, the applicant or licensee may, within 10 days of that decision file a written appeal with the city secretary to the city council setting forth specific grounds for the appeal. The city council shall, within 30 days, grant a hearing to consider the action. The city council has authority to sustain, reverse, or modify the action appealed. The decision of the city council is final. (Ord. 14736)

#### SEC. 6A-10. HOURS OF OPERATION.

- (a) Except as provided in Subsection (b) or (c) of this section, no licensee or his operator may operate the amusement center between the hours of 12:01 a.m. to 9 a.m., Monday through Friday, and between the hours of 2 a.m. to 9 a.m., Saturday and Sunday.
- (b) If an amusement center is within 500 feet of a district restricted to residential use under the Comprehensive General Zoning Ordinance of the City of Dallas, no licensee or his operator may operate the amusement center except between the hours of 9 a.m. to 11 p.m., Sunday through Thursday, and between the hours of 9 a.m. to 12 midnight, Friday and Saturday.
- (c) If an amusement center is within 500 feet of a public or private elementary or secondary school, no licensee or his operator may operate the amusement center between the hours of 9 a.m. to 4 p.m. during the fall or spring term when students are required to attend school in the school district in which the center is located.

- (d) For purposes of this chapter measurements shall be made in a straight line without regard to intervening structures or objects, from the nearest entry door in the portion of the building used as an amusement center to the nearest point of a district restricted to residential use or nearest entry door of a school.
- (e) If an amusement center's hours are restricted only by Subsection (a) of this section, a licensee may obtain a temporary permit to operate continuously. The chief of police shall issue a temporary permit for no longer than 30 days and only once a year. (Ord. 14736; Ord. 14932; Ord. 16586)

#### SEC. 6A-11. RESPONSIBILITY OF LICENSEE.

- (a) A licensee or his operator may not permit any of the following activities within the amusement center:
- violation of any possession, sale, or delivery provision in Subchapter 4 of the Texas Controlled Substances Act;
- (2) violation of any provision in Article 666-17 (14) of the Texas Liquor Control Act;
  - (3) prostitution;
  - (4) gambling; or
- (5) entry of a person-younger than 17 years between the hours of 9 a.m. to 3 p.m. during the fall or spring term when students are required to attend school in the school district in which the center is located.

- (b) A licensee or his operator may not permit any of the following activities on premises of the amusement center:
  - (1) violation of Section 42.01 of the Penal Code; or
- (2) violation of Chapter 7A of the Dallas City Code.
- (c) In Subsection (b) of this section, "premises" means an area, other than the interior of an amusement center, to which the public or a substantial group of the public has access and which is under the control of an owner or operator of an amusement center, such as a parking facility or private sidewalk. (Ord. 14736; Ord. 14932)

#### CHAPTER 14

#### DANCE HALLS

- Sec. 14-1. Definitions.
- Sec. 14-2. License required.
- Sec. 14-3. Issuance of license; posting.
- Sec. 14-4. Fees.
- Sec. 14-5. Hours of operation.
- Sec. 14-6. Inspection.
- Sec. 14-7. Dance hall supervisor.
- Sec. 14-8. Persons under 17 prohibited.
- Sec. 14-9. Expiration of license.
- Sec. 14-10. Suspension.
- Sec. 14-11. Revocation.
- Sec. 14-12 Appeal.
- Sec. 14-13 Transfer of license.

### Sec. 14-1 DEFINITIONS.

#### In this chapter:

- DANCE HALL means a place where dancing is permitted.
- (2) CLASS A DANCE HALL means any place where dancing is permitted three days or more a week.
- (3) CLASS B DANCE HALL means any place where dancing is permitted less than three days a week.
- (4) CLASS C DANCE HALL means any place where dancing is scheduled one day at a time.
- (5) CLASS D DANCE HALL means any place where instruction in dancing is given for consideration.
- (6) LICENSE means a permit to operate a dance hall.

- (7) LICENSEE means a person in whose name a license to operate a dance hall has been issued, as well as the individual listed as an applicant on the application for a dance hall license.
- (8) PERSON means an individual, partnership, corporation, association, or other legal entity.
- (9) PRIVATE CLUB means an association of persons for the promotion of some common object, which operates not for a profit a place for the accommodation of its members and guests only. (Ord. 15721)

#### SEC. 14-2. LICENSE REQUIRED.

- (a) A person commits an offense if he operates a dance hall without a license.
- (b) An application for a license must be made on a form provided by the chief of police. The applicant must be qualified according to the provisions of this chapter and his premises must be inspected and found to be in compliance with the law by the health department, fire department, and building official.
- (c) A person who wishes to operate a dance hall must sign the application for a license as applicant. If a person who wishes to operate a dance hall is other than an individual, each individual who has a 20 percent or greater interest in the business must sign the application for a license as an applicant. A person who wishes to operate a Class D dance hall must give the name and address of each person who is an instructor. Each applicant must meet the requirements of Section 14-3(a) and

each applicant shall be considered a licensee if a license is granted.

- (d) It is a defense to prosecution under this section that the actor is conducting a dance at:
- a private residence from which the general public is excluded;
- (2) a place owned by the federal, state, or local government;
- (3) a public or private elementary school, secondary school, college or university;
  - (4) a place owned by a religious organization; or
  - (5) a private club.
- (e) A person who possesses a valid dance hall license shall not be required to obtain a license as a theater in accordance with the provisions of Chapter 46 of this Code if live performances are presented to the public for an admission fee, cover charge, or other consideration and the operation of the dance hall is in compliance with the provisions of this chapter. (Ord. 15721)

#### SEC. 14-3. ISSUANCE OF LIC. 'SE; POSTING.

- (a) The chief of police shall issue a license to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:
  - (1) An applicant is under 18 years of age.

- (2) An applicant or an applicant's spouse is not of good moral character, and his reputation for being peaceable and law-abiding in the community where he resides or does business is bad.
- (3) An applicant or an applicant's spouse is overdue in his payment to the city of taxes, fees, fines, or penalities assessed against him or imposed upon him.
- (4) An applicant uses alcoholic beverages to excess.
- (5) An applicant is physically or mentally incapacitated to an extent that he cannot operate a dance hall.
- (6) An applicant has failed to answer or falsely answered a question or request for information on the application form provided.
- (7) An applicant or an applicant's spouse has been convicted of a violation of a sision of this chapter, other than the offense of rating a dance hall without a license, within two years immediately preceding the application. The fact that a conviction is being appealed shall have no effect.
- (8) An applicant is residing with a person who has been denied a license by the city to operate a dance hall within the preceding 12 months, or residing with a person whose license to operate a dance hall has been revoked within the preceding 12 months.
- (9) An applicant's premises have not been approved by the health department, fire department, and the building official.

- (10) The license fee required by this chapter has not been paid.
- (11) An applicant or an applicant's spouse has been convicted of:
  - (A) a felony; or
  - (B) a misdemeanor involving an offense of:
    - (i) prostitution,
    - (ii) promotion of prostitution,
    - (iii) public lewdness,
    - (iv) gambling,
- (v) violation of the Texas Controlled Substances and Dangerous Drugs Act, or
  - (vi) unlawfully carrying a weapon;

and five years have not elapsed since the termination of any sentence, parole, or probation. The fact that a conviction is being appealed shall have no effect.

- (12) An applicant has been employed in a dance hall in a managerial capacity within the preceding 12 months and has demonstrated that he is unable to operate or manage a dance hall premises in a peaceful and law abiding manner.
- (b) The license shall state on its face the name of the person to whom it is granted, the expiration date, the address of the dance hall, and whether it is issued for a Class A, Class B, Class C, or Class D dance hall.

(c) The license shall be posted in a conspicuous place at or near the entrance to the dance hall so that it may be easily read at any time. (Ord. 15721; Ord. 16067)

#### SEC. 14-4. FEES.

The following non-refundable fees shall be charged for each license issued under the terms of this chapter:

- (a) For a Class A dance hall, the annual license fee is \$250.00;
- (b) For a Class B dance hall, the annual license fee is \$125.00:
- (c) For a Class C dance hall, the daily license fee is \$10.00;
- (d) For a Class D dance hall, the annual license fee is \$25.00. (Ord. 15721)

#### SEC. 14-5. HOURS OF OPERATION.

- (a) A person commits an offense if he operates a Class A, Class B, or Class C dance hall between the hours of 2:00 a.m. and 7:00 a.m., Monday through Saturday, or between 2:00 a.m. and 12:00 noon on Sunday.
- (b) A person commits an offense if he operates a Class D dance hall between the hours of 12 midnight and 7:00 a.m. (Ord. 15721)

#### SEC. 14-6. INSPECTION.

(a) Representatives of the police department, health department, fire department, and housing and urban

rehabilitation department may inspect the premises of a dance hall for the purpose of insuring compliance with the law, at any time it is open for business or occupied.

(b) A person who operates a dance hall or person designated as the dance hall supervisor commits an offense if he refuses to permit a lawful inspection of the premises of a dance hall by a representative of the police department at any time it is open for business or occupied. (Ord. 15721)

#### SEC. 14-7. DANCE HALL SUPERVISOR.

- (a) A person who operates a dance hall must designate a person as dance hall supervisor and register his name with the chief of police.
- (b) A person designated dance hall supervisor must remain on the premises of the dance hall during the time dancing is permitted and until 30 minutes after the end of the dance to insure that the dance is conducted in an orderly manner. (Ord. 15721)

#### SEC. 14-8. PERSONS UNDER 17 PROHIBITED.

- (a) No person under the age of 17 years may enter a Class A, Class B or Class C dance hall unless accompanied by a parent or guardian.
- (b) A person commits an offense if he falsely represents himself to be either a parent or guardian of a person under the age of 17 years for the purpose of gaining the person's admittance into a dance hall.

(c) A licensee or employee of a Class A, Class B, or Class C dance hall commits an offense if he knowingly allows a person under the age of 17 years to enter or remain on the premises of the dance hall unless he is accompanied by his parent or guardian. (Ord. 15721)

#### SEC. 14-9. EXPIRATION OF LICENSE.

- (a) A License for a Class A, Class B, or Class D dance hall shall expire one year from the date of issuance and may be renewed only by making application as provided in Section 14-2. Application for renewal should be made at least 30 days before the expiration date, and when made less than thirty days before the expiration date the expiration of the license will not be affected.
- (b) A license for a Class C dance hall shall expire at 2:00 a.m. on the day following the date of the dance.
- (c) When the chief of police denies renewal of a license, the applicant shall not be issued a license for one year from the date denial becomes final. If, subsequent to denial, the chief of police finds that the basis for denial of the renewal license has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date denial became final. (Ord. 15721)

#### SEC. 14-10. SUSPENSION.

The chief of police shall suspend a dance hall license for a period of time not exceeding 30 days if he determines that a licensee or an employee of a licensee has:

(1) violated Sections 14-3(c), 14-5, 14-8, or 14-13 of this chapter;

- (2) engaged in excessive use or alcoholic beverages while on the dance hall premises;
- (3) refused to allow an inspection of the dance hall premises as authorized in this chapter;
- (4) knowingly permitted an intoxicated person to remain on the premises;
- (5) knowingly permitted gambling by any person on the dance hall premises; or
- (6) demonstrated inability to operate or manage a dance hall premises in a peaceful and law abiding manner, thus necessitating action by law enforcement officers. (Ord. 15721)

#### SEC. 14-11. REVOCATION.

- (A) The chief of police shall revoke a license if a cause of suspension in Section 14-10 occurs and the license has been suspended within the preceding 12 months.
- (b) The chief of police shall revoke a license if he determines that:
- a licensee has given false or misleading information in the material submitted to the chief of police during the application process;
- (2) a licensee or an employee is unable to lawfully operate the dance hall because of physical or mental impairment;

- (3) a licensee or an employee has knowingly allowed possession, use, or sale of controlled substances on the premises;
- (4) a licensee or an employee has knowingly allowed prostitution on the premises; or
- (5) a licensee or an employee knowingly permitted a customer to dance during a period of time when the dance hall license was suspended.
  - (6) A licensee has been convicted of:
    - (A) a felony; or
    - (B) a misdemeanor involving an offense of:
      - (i) prostitution,
      - (ii) promotion of prostitution,
      - (iii) public lewdness,
      - (iv) gambling,
- (v) violation of the Texas Controlled Substances and Dangerous Drugs Act, or
  - (vi) unlawfully carrying a weapon;

and five years have not elapsed since the termination of any sentence, parole, or probation. The fact that a conviction is being appealed shall have no effect.

(c) when the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a dance hall license for one year from the date revocation became final. If, subsequent to revocation, the chief of police finds that the basis for the

revocation action has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date the revocation became final. If the license was revoked under Subsection 6, and applicant may not be granted another license. (Ord. Nos. 15721; 16067)

#### SEC. 14-12. APPEAL.

If the chief of police denies the issuance of a license, or suspends or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action and the right to an appeal. The aggrieved party may appeal the decision of the chief of police to a permit and license appeal board in accordance with Section 2-96 of this code. The filing of an appeal stays the action of the chief of police in suspending or revoking a license until the permit and license appeal board makes a final decision. (Ord. Nos. 15721; 16067; 18200)

#### SEC. 14-13. TRANSFER OF LICENSE.

A licensee shall not transfer his license to another, nor shall a licensee operate a dance hall under the authority of a license at any place other than the address designated in the application. (Ord. 15721)

## CHAPTER 46 THEATERS

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#### ARTICLE I - IN GENERAL

SEC. 46-1. DEFINITIONS.

In this chapter:

- A PUBLIC HOUSE OF AMUSEMENT means a structure that is used as a theater, moving picture theater, moving picture show, or orchestral concert hall.
- (2) THEATER means a structure, including but not limited to a hotel, restaurant, tavern, and other comparable establishment, in which dance, drama, opera, musical, or other similar live performances are presented to the public for an admission fee, cover charge, or other consideration.
- (3) MOVING PICTURE SHOW means a structure in which moving picture films are exhibited to the public for an admission fee, cover charge, or other consideration.
- (4) MOVING PICTURE THEATER means a structure which is used as a theater and moving picture show.
- (5) ORCHESTRAL CONCERT HALL means a structure in which vocal or instrumental musical concerts are presented to the public for an admission fee, cover charge or other consideration.
- (6) LICENSE means a permit to operate a public house of amusement.
- (7) LICENSEE means the person in whose name a license to operate a public house of amusement has been issued, as well as the individual(s) listed as applicant(s) on the application for a public house of amusement.

(8) PERSON means an individual, partnership, company, corporation, association, firm, organization, institution, or similar entity. (Ord. 16210)

#### 46-2. CLASSIFICATION.

Public houses of amusement are hereby classified as follows:

- (1) Theaters.
- (2) Moving picture theaters.
- (3) Moving picture shows.
- (4) Orchestral concert halls. (Ord. 16210)

#### SEC. 46-3. LICENSE REQUIRED.

- (a) A person commits an offense if he operates a public house of amusement without a valid license, issued by the city for the particular class of house operated.
- (b) An application for a license must be made on a form provided by the chief of police. The applicant must be qualified according to the provisions of this chapter and the premises must be inspected and found to be in compliance with the law by the health department, fire department, and building official.
- (c) If a person who wishes to operate a public house of amusement is an individual, he must sign the application for a license as applicant. If a person who wishes to operate a public house of amusement is other than an individual, each individual who has a 20 percent or greater interest in the business must sign the application

for a license as applicant. Each applicant must meet the requirements of Section 46-4, and each applicant shall be considered a licensee if a license is granted.

- (d) It is a defense to prosecution under this section that a theater, moving picture theater, moving picture show, or orchestral concert hall is operated by a:
- church, temple, synagogue, or other nonprofit religious organization;
  - (2) governmental entity;
  - (3) nonprofit civic or social organization;
- (4) proprietary school which is licensed by the state;
- (5) public or private elementary or secondary school;
- (6) college, junior college, or university which is supported entirely or partially by taxes; or
- (7) private college or university that maintains and operates educational programs from which credits are transferable to a college, junior college, or university that is supported entirely or partially by taxes.
- (e) A person who possesses a valid dance hall license is not required to obtain a public house of amusement license for a theater if live performances are presented to the public for an admission fee, cover charge, or other consideration and the operation of the dance hall is otherwise in compliance with the provisions of Chapter 14 of this code.

(f) The securing of a license entitles the holder of the license to operate the classification of public house of amusement for which license was issued, and also, without additional license, to operate a public house of amusement for which a lower license fee is charged, but not a public house of amusement for which a higher fee is charged. (Ord. 16210)

#### SEC. 46-4. ISSUANCE OF LICENSE.

- (a) The Chief of Police shall approve the issuance of a license by the Assessor and Collector of Taxes to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:
  - (1) An applicant is under 18 years of age;
- (2) An applicant or applicant's spouse is not of good moral character and his reputation for being peaceable and law-abiding in the community where he resides or does business is bad;
- (3) An applicant or an applicant's spouse is overdue in his payment to the city of taxes, fees, fines, or penalties assessed against him or imposed upon him;
- (4) An applicant uses alcoholic beverages to excess;
- (5) An applicant is physically or mentally incapacitated to an extent he cannot properly operate a public house of amusement;
- (6) An applicant has failed to answer or has falsely answered a question or request for information on the application form provided;

- (7) An applicant or an applicant's spouse has been convicted of a violation of a provision of this chapter, other than the offense of operating a public house of amusement without a license, within two years immediately preceding the application. The fact that a conviction is being appealed shall have no effect.
- (8) An applicant is residing with a person who has been denied a license by the city to operate a public house of amusement within the preceding 12 months, or residing with a person whose license to operate a public house of amusement has been revoked within the preceding 12 months.
- (9) An applicant's premises have not been approved by the health department, fire department, and the building official.
- (10) The license fee required by this chapter has not been paid.
- (11) An applicant or an applicant's spouse has been convicted of:
  - (A) a felony; or
  - (B) a misdemeanor involving an offense of:
    - (i) prostitution,
    - (ii) promotion of prostitution,
    - (iii) public lewdness,
    - (iv) gambling,
- (v) violation of the Texas Controlled Substances and Dangerous Drugs Act, or

#### (vi) unlawfully carrying a weapon;

and five years have not elapsed since the termination of any sentence, parole, or probation. The fact that a conviction is being appealed shall have no effect.

- (12) An applicant has been employed in a public house of amusement in a managerial capacity within the preceding 12 months and has demonstrated that he is unable to operate or manage a public house of amusement premises in a peaceful and law-abiding manner.
- (b) The license, if granted, shall state on its face the name of the person to whom it is granted, the expiration date, and the address of the public house of amusement. The license shall be posted in a conspicuous place at or near the entrance of the public house of amusement so that it may be easily read at any time. (Ord. 16210)

#### SEC. 46-5. FEES.

The following non-refundable fees shall be charged for each classification of public house of amusement license issued under the terms of this chapter:

- (a) For a theater, the annual license fee is \$150;
- (b) For a moving picture theater, the annual license fee is \$75;
- (c) For a moving picture show, the annual license fee is \$65;
- (d) For an orchestral concert hall, the annual license fee is \$25. (Ord. 16210)

#### SEC. 46-6. HOURS OF OPERATION.

A person commits an offense if he operates a public house of amusement between the hours and 2:00 a.m. and 7:00 a.m.; Monday through Saturday, or between the hours of 2:00 a.m. and 12 noon Sunday. (Ord. 16210)

#### SEC. 46-7 INSPECTION.

- (a) Representatives of the police department, health department, fire department, tax department, and housing and urban rehabilitation department may inspect the premises of a public house of amusement for the purpose of insuring compliance with the law, at any time it is open for business or occupied.
- (b) A person who operates a public house of amusement or his agent or employee commits an offense if he refuses to permit a lawful inspection of the premises of a public house of amusement by a representative of the police department at any time it is open for business or occupied. (Ord. 16210)

#### SEC. 46-8. EXPIRATION OF LICENSE.

(a) Each license shall expire one year from the date of issuance and may be renewed only by making application as provided in Section 46-3. Application for renewal should be made at least 30 days before the expiration date, and when made less than 30 days before the expiration date, the expiration of the license will not be affected.

(b) When the chief of police denies renewal of a license, the applicant shall not be issued a license for one year from the date of denial. If, subsequent to denial, the chief of police finds that the basis for denial of the renewal license has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date denial became final. (Ord. 16210)

#### SEC. 46-9. SUSPENSION.

The chief of police shall suspend a license for a period not to exceed 30 days if he determines that a licensee or an employee of a licensee has:

- (1) violated Section 46-6, Section 46-7, Section 46-12.1, Section 46-12.2, or Section 46-12.3 of this chapter;
- (2) engaged in excessive use of alcoholic beverages while on the public house of amusement premises;
- (3) refused to allow an inspection of the public house of amusement premises as authorized by this chapter;
- (4) knowingly permitted gambling by any person on the public house of amusement premises;
- (5) demonstrated inability to operate or manage a public house of amusement premises in a peaceful and law-abiding manner thus necessitating action by law enforcement officers. (Ord. 16210)

#### SEC. 46-10. REVOCATION.

- (a) The chief of police shall revoke a license if a cause of suspension in Section 46-9 occurs and the license has been suspended within the preceding 12 months.
- (b) The chief of police shall revoke a license if he determines that:
- a licensee has given false or misleading information in the material submitted to the chief of police during the application process;
- (2) a licensee or an employee is unable to lawfully operate the public house of amusement because of physical or mental impairment;
- (3) a licensee or an employee has knowingly allowed possession, use, or sale of controlled substances on the premises;
- (4) a licensee or an employee has knowingly allowed prostitution on the premises; or
- (5) a licensee or employee knowingly operates a public house of amusement during a period of time when the licensee's license was suspended; or
  - (6) a licensee has been convicted of:
    - (A) a felony; or
    - (B) a misdemeanor involving an offense of:
      - (i) prostitution,
      - (ii) promotion of prostitution,
      - (iii) public lewdness;
      - (iv) gambling,

(v) violation of the Texas Controlled Substances and Dangerous Drugs act, or

(vi) unlawfully carrying a weapon; and five years have not elapsed since the termination of any sentence, parole, or probation. The fact that a conviction is being appealed shall have no effect.

(c) When the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a public house of amusement license for one year from the date revocation became final. If, subsequent to revocation, the chief of police finds that the basis for the revocation actions has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date the revocation became final. If the license was revoked under Subsection 6, an applicant may not be granted another license. (Ord. 16210)

#### SECTION 46-11. APPEAL,

(a) If the chief of police denies the issuance of a license, or suspends or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action and the right to an appeal. The aggrieved party may appeal the decision of the chief of police to the city manager within 10 days after receipt of the notice from the chief of police. The action of the chief of police is final unless a timely appeal is made. The filing of an appeal stays the action of the chief of police in suspending or revoking a license until the city manager, or his designee, makes a final decision.

(b) The city manager, or his designated representative, shall serve as hearing officer and consider evidence offered by any interested person. The formal rules of evidence do not apply to an appeal hearing under this section; the hearing officer shall make his decision on the basis of a preponderance of the evidence presented at the hearing. The hearing officer must render a final decision within 30 days after the request for a hearing is filed. The hearing officer shall affirm, reverse, or modify the action of the chief of police. The decision of the hearing officer is final unless the applicant or licensee files a written request with the city secretary for a hearing before the license appeal board within 10 days after receipt of notice of the action of the hearing officer.

(c) If a written request for an appeal hearing is filed with the city secretary within the 10 day limit, the city council shall appoint three city council members to serve as a license appeal board and shall set a date for the hearing. The license appeal board shall hear and consider evidence offered by any interested person. The formal rules of evidence do not apply. The license appeal board shall decide the appeal on the basis of a preponderance of the evidence presented at the hearing if there is a dispute as to fact, otherwise the board shall decide the appeal in accordance with the express provisions of this chapter. The board shall affirm, reverse, or modify the action of the hearing officer by a majority vote. Failure to reach a majority decision on a motion shall leave the hearing officer's decision unchanged. The decision of the license appeal board is final. (Ord. 16210)

SEC. 46-12. RESERVED.

(Repealed by Ord. 16210)

#### SEC. 46-12.1. TRANSFER OF LICENSE.

A licensee shall not transfer his license to another, nor shall a licensee operate a public house of amusement under the authority of a license at any place other than the address designated in the application. (Ord. 16210)

#### SEC. 46-12.2. SPIELING PROHIBITED.

A person commits an offense if he stands in front of, or is on any public street in front of, any public house of amusement, and by spieling or loud talking, seeks to induce passersby to enter or patronize the public house of amusement. (Ord. 16210)

## SEC. 46-12.3 PROHIBITING EXHIBITION OF CERTAIN SEXUALLY EXPLICIT FILMS IN SPECIFIED AREAS.

- (a) A person commits an offense if he operates or causes to be operated within 1000 feet of a church, public or private elementary or secondary school, district restricted to residential use by the Comprehensive Zoning Ordinance of the city, or public park adjacent to a district restricted to residential use a moving picture show or moving picture theater which exhibits a film that explicitly depicts:
- contact between any part of the genitals of one person and the genitals, mouth, or anus of another person;

- (2) contact between a person's mouth, anus, or genitals and the mouth, anus, or genitals of an animal or fowl;
  - (3) manipulation of a person's genitals;
  - (4) defecation; or
  - (5) urination.
- (b) It is a defense to prosecution under Subsection (a) that the moving picture theater or moving picture show was being operated lawfully as a moving picture theater or moving picture show at the same location and upon the same premises upon the effective date of this subsection and has continuously operated at that location as a moving picture theater or moving picture show. (Ord. Nos. 16210, 16270)

#### SEC. 46-12.4. MEASUREMENT OF DISTANCES.

For the purposes of this article, measurement shall be made in straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises where a theater or show is conducted to the nearest property line of the premises of a church or public or private elementary or secondary school, or to the nearest boundary of a district restricted to residential use. (Ord. 16210)

## ARTICLE II. MOTION PICTURE CLASSIFICATION

SEC. 46-13. DEFINITIONS.

(a) In this article:

- (1) ADVERTISEMENT means material which is designed to attract the attention of the public to a film and is displayed by use of a newspaper.
- (2) BOARD means the Dallas Motion Picture Classification Board.
- (3) FILE means to deliver to the director of consumer services.
- (4) FILM means a motion picture, but does not include a motion picture which depicts current events or news.
- (5) INITIAL EXHIBITION means the first public showing of a film in the city.
- (6) INTERESTED PARTY means a film distributor or exhibitor who has a monetary interest in a film.
- (7) NOT SUITABLE FOR YOUNG PERSONS means a film:
- (A) which depicts sexual conduct, nudity, defecation, or urination in a manner which is patently offensive to the average person applying contemporary community standards with respect to what is suitable for viewing by young persons; and which, taken as a whole:
- (i) appeals to the prurient interest of young persons; and
- (ii) lacks serious literary, artistic, political, or scientific value for young persons; or
- (B) which explicitly depicts the infliction of serious bodily injury by a person upon another person or animal, or which explicitly depicts a person inflicting

serious damage to or destroying property, and the infliction of injury, damage, or destruction is:

- (i) an intentional act;
- (ii) depicted without the express portrayal of significant adverse legal, physical, emotional, or societal consequences to the person who inflicts the injury, damage, or destruction; and
- (iii) contrary to contemporary community legal, ethical, or moral standards; or
- (C) which explicitly depicts serious bodily injury to a person, and the depiction of the injury is patently offensive to the average person applying contemporary community standards with respect to what is suitable for viewing by young persons.
- (8) NUDITY means a human bare buttock, anus, male genitals, female genitals, or female breast.
- (9) OBSCENE LANGUAGE means spoken words which are lewd, lascivious, or filthy.
  - (10) PROPERTY means:
    - (A) real property; or
- (B) tangible personal property, including anything severed from land.
- (11) PRURIENT INTEREST means a shameful or morbid interest in sexual conduct, nudity, defecation, or urination.
- (12) RECKLESS means a person's mental state with respect to circumstances surrounding his conduct or

the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's standpoint.

- (13) SERIOUS BODILY INJURY means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of any bodily member or organ.
- (14) SERIOUS DAMAGE means damage to property which results in a substantial pecuniary loss to the owner or a third person.

#### (15) SEXUAL CONDUCT means:

- (A) any contact between any part of the genitals of one person and the genitals, mouth, or anus of another person;
- (B) any contact between a person's mouth, anus, or genitals and the mouth, anus, or genitals of animal or fowl; or
  - (C) any manipulation of a person's genitals.
- (16) YOUNG PERSON means a person who is under the age of 16 years.
- (b) In computing a period of time prescribed or allowed under this article, the day of an act or event is not included in the computation of the time period. The

last day of the period of time is included in the computation unless that day is a Saturday, Sunday or legal holiday, in which event the next day following which is not a Saturday, Sunday, or legal holiday is included in the computation. (Ord. Nos. 12169; 14862; 14930; 15365; 16133; 17517)

## SEC. 46-14. MOTION PICTURE CLASSIFICATION BOARD ESTABLISHED.

- (a) There is created a board to be known as the motion picture classification board composed of a chairman, vice-chairman and 24 other members to be appointed by the city council. Members shall serve without pay and their terms of office will be for a period of two years beginning on September 1 of each odd numbered year. The board shall adopt rules and regulations, subject to approval of the city council, to govern its proceedings and deliberations. When a vacancy occurs on the board, the city council shall appoint a new member to fill the vacancy for the unexpired term. Six members shall constitute a quorum and issues shall be decided by a simple majority of those present.
- (b) Members of the board must be residents of the city, and shall be chosen as far as practicable in a manner that will represent the entire community. Members should be educated or experienced in one or more of the following fields: art, drama, law, literature, philosophy, sociology, psychology, history, education, music, science, or other fields. At least four members must be qualified to interpret and write the Spanish language, (Ord. Nos. 12169; 12373; 14552; 14730; 14862; 14930; 14952)

#### SEC. 46-15. CLASSIFICATION PROCEDURE.

- (a) Within a reasonable time before initial exhibition, a distributor shall file an application which contains the following information concerning a film:
- (1) Proposed classification, either "Suitable for Young Persons" or "Not Suitable for Young Persons".
  - (2) Title of film and date of initial exhibition.
- (3) Summary of plot and names of the primary actors.
- (b) If a "Not Suitable for Young Persons" classification is proposed by a distributor, the board shall accept the classification by formal board action or failure to act within seven days after the application is filed. If a "Suitable for Young Persons" classification is proposed by a distributor, the board shall:
  - (1) accept the classification by:
    - (A) formal board action; or
- (B) failure to act within seven days after an application is filed unless the board directs additional information filed;
- (2) direct a distributor to file additional information on a film and when the information is filed, accept the classification by:
  - (A) formal board action; or
- (B) failure to act within seven days after the additional information is filed unless the board orders projection of a film;

- (3) order a distributor to project a film before the board and accept the classification by:
  - (A) formal board action; or
- (B) failure to act within two days after viewing a film or failure to meet after a screening is scheduled; or
- (4) reject the classification and determine a classification by formal board action within two days after viewing a film.
- (c) A distributor shall provide a suitably equipped screening room for the board to view a film at reasonable hours and may present additional information in support of a proposed classification.
- (d) If the board files a "Not Suitable for Young Persons" classification order and the proposed classification had been "Suitable for Young Persons", the order shall contain the following information:
  - (1) Classification.
  - (2) Basis for classification under this article.
- (3) Any other information the board considers useful to a distributor.
- (e) If the board files a "Suitable for Young Persons" classification order, the board may attach one or more of the following symbols to indicate exceptions to the order and to advise parents of young persons that a film contains certain material:
- (1) 'L' means obscene language or language used to describe sexual conduct, defecation, urination, or genitalia.

- (2) "S" means sexual conduct or implicit sexual conduct or defecation or urination.
- (3) "V" means infliction of serious bodily injury to a person or animal, or infliction of serious damage to or destruction of property.
- (4) "D" means use of harmful drugs or drug abuse.
  - (5) "N" means nudity.
- (6) "P" means a perverse person such as a masochist, sadist, pederast, or other aberrant sexual person. The attachment of an exception to an order is for public information only and is not subject to judicial review under Section 46-16 of this article.
- (f) If the board files a classification order without viewing a film and subsequent investigation reveals a possible erroneous classification, the board may order projection of the film under this section. In the event a film is reclassified, the interested party shall alter his advertising accordingly within two days after the reclassification and comply immediately with the audience provisions of this article. After one year from an original classification order unless the time limit is waived by the board, a distributor may file an application for reclassification in which case the procedures in this section apply.
- (g) When the board files a classification order or any other order under this article, the director of consumer affairs shall give notice of the order by mail to the distributor and any other interested party who requests the notice.

(h) No young person may attend a screening of a film while the board is viewing the film for the purpose of classification under this article. (Ord. Nos. 12169; 13271; 13525; 13548; 14730; 14862; 14930; 15365; 15511; 16295; 17517)

#### SEC. 46-16. JUDICIAL REVIEW.

- (a) Within two days after the board files a classification order under Section 46-15(d) of this article, as interested party may file notice of nonacceptance of the classification. Within three days after notice of nonacceptance is filed, the board shall initiate suit in district court for determination that a film is "Not Suitable for Young Persons" and for an injunction to prohibit the exhibition of the film in violation of this article. The board shall bear the burden of showing that the film is "Not Suitable for Young Persons" and shall proceed with all diligence and expedition in the adjudication of the case.
- (b) When a notice of nonacceptance is filed by an interested party, this action constitutes nonacceptance by both the distributor and exhibitor. (Ord. Nos. 12169; 14930; 15365)

## SEC. 46-17. CERTAIN ACTS DECLARED PUBLIC NUISANCES.

The following acts are declared to be public nuisances under this article:

(1) A violation of Section 46-18(a) of this article.

- (2) Violation of Section 46-18(c)(1) or (2) of this article by an exhibitor, if he or his employee is convicted three times within a two-year period.
- (3) Exhibition of a film classified "No. Suitable for Young Persons" at which more than three young persons are in attendance. (Ord. Nos. 12169; 14930)

#### SEC. 46-18. UNLAWFUL ACTS.

- (a) An exhibitor or employee of an exhibitor commits an offense, without regard to his mental state, if he:
- (1) exhibits a film which has not been classified by the board.
- (2) exhibits a film contrary to a classification order;
- (3) fails to post conspicuously in a ticket booth of a theater the classification order; or
- (4) exhibits in a theater to a young person a filmed advertisement of a film which has not been classified or is classified "Not Suitable for Young Persons."
- (b) A young person commits an offense, without regard to his mental state, if he:
- (1) represents falsely he is 16 years of age or older for the purpose of viewing a film classified "Not Suitable for Young Persons"
- (2) represents falsely that a person is his parent or legal guardian for the purpose of viewing a film classified "Not Suitable for Young Persons", or

- (3) views a film classified "Not Suitable for Young Persons" if a sign is posted conspicuously in a ticket booth of a theater indicating a "Not Suitable for Young Persons" classification.
  - (c) A person commits an offense if he recklessly:
- sells or gives to a young person a ticket to a film classified "Not Suitable for Young Persons";
- (2) allows a young person to view a film classified "Not Suitable for Young Persons";
- (3) makes a false statement for the purpose of enabling a young person to view a film classified "Not Suitable for Young Persons"; or
- (4) allows a young person to attend a screening of a film while the board is viewing the film for the purpose of classification under this article.
- (d) A film distributor or employee of a distributor commits an offense, without regard to his mental state, if he fails to have a film classified by the board and the film is exhibited to the public.
- (e) Upon failure of a distributor to obtain a classification order for a film, an exhibitor of the film may notify in writing the director of consumer affairs of his intent to exhibit and advertize the film as "Not Suitable for Young Persons" until a classification order is obtained. After notification, the exhibitor shall treat the film as if it were "Not Suitable for Young Persons" and comply with the provisions of this article in that regard.
- (f) A film distributor or employee of a distributor commits an offense, without regard to his or her mental

state, if he or she prohibits any person who is sixteen years of age or over from attending the screening of a film at the time the board is viewing the film. It is a defense to prosecution under this subsection (f) if a film distributor or an employee of a distributor prohibits a person from attending a screening in order to comply with Chapter 16 of this code. (Ord. Nos. 12169; 14930; 15145; 15365; 16133; 17028)

#### SEC. 46-19. DEFENSE.

- (a) It is a defense to prosecution under Sections 46-17(3), 46-18(a)(4), 46-18(b)(3), 46-18(c)(1) or 46-18(c)(2) of this article that the young person was accompanied by his parent or legal guardian during exhibition of the film.
- (b) If is a defense to prosecution under Section 46-18(a)(2), 46-18(a)(3), 46-18(a)(4), 46-18(b)(3), 46-18(c)(1), 46-18(c)(2), and 46-20(a)(2)(A) of this article that a notice of nonacceptance has been filed and no temporary or permanent injunction has been granted pursuant to the provisions of Section 46-16. (Ord. Nos. 12169; 13525; 13548; 14930: 16133; 17517)

#### SEC. 46-20. ADVERTISEMENT.

- (a) A film distributor, exhibitor, or an employee of a film distributor or exhibitor commits an offense, without regard to his mental state, if he:
- places or causes to be placed an advertisement for a film which has not been classified by the board;
- (2) places or causes to be placed an advertisement which:

- (A) fails to display or displays incorrectly the classification order of the board; or
- (B) describes as "Suitable" a film classified by the board as "Not Suitable for Young Persons", regardless of whether a notice of nonacceptance has been filed and regardless of whether a temporary or permanent injunction has been granted pursuant to the provisions of Section 46.16; or
- (3) places or causes to be placed an advertisement which fails to comply with the following requirements:
- (A) Minimum type size of six points for a classification order if the advertisement is at least two columns in width and two inches in height.
- (B) Minimum type size of five points for a classification order if the advertisement is less than two columns in width and two inches in height and Section 46-20(a)(3)(C) does not apply.
- (C) A point size and style for a classification order which is the same as the show time if the advertisement is three-fourths an inch or less in height.
- (D) Type style and face for a classification order which is legible and readable.
- (E) Location for a classification order which is near the Motion Picture Association of America rating, if a rating appears.
- (b) In an advertisement, the wording of a classification order is:
- "Not Suitable", if the order is "Not Suitable for Young Persons";

- (2) "Suitable Except (S)(V)(L)(D)(N)(P)", whichever symbol applies if the order is "Suitable for Young Persons" with Exceptions; or
- (3) "Suitable", if the order is "Suitable for Young Persons".
- (c) It is a defense to prosecution under Subsection (a) of this section that the advertisement appeared only before the day of initial exhibition.
- (d) It is a defense to prosecution under Subsection (a)(2) of this section that the actor was unable to correct the advertisement immediately, but the correction was made within a reasonable time after the classification order was issued.
- (e) If a theater primarily exhibits Spanish language films or a newspaper primarily publishes in the Spanish language, the display or advertisement of a classification order which is required under this chapter must appear in the Spanish language. (Ord. Nos. 15145; 15365; 17517)

## PETITIONER'S

# BRIEF

No. 87-2012

FILED

APR 11 100

JOSEPH F. SPANIOL, SR.
CLERK

### IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

FW/PBS, INC., et al.,

Petitioners,

VS.

THE CITY OF DALLAS, et al.,

Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

#### BRIEF OF PETITIONERS FW/PBS, ET AL.

ARTHUR M. SCHWARTZ, P.C. Arthur M. Schwartz\* Bradley J. Reich Michael W. Gross Dominion Plaza 600-17th Street, Suite 2250S Denver, Colorado 80202 (303) 893-2500

Attorneys for Petitioners
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Petition for Certiorari filed June 8, 1988 Certiorari granted February 27, 1989

#### **QUESTIONS PRESENTED FOR REVIEW**

- I. Does the Dallas sexually oriented business license ordinance impose an unconstitutional prior restraint on protected expression by providing for the denial or revocation of a license to engage in protected First Amendment activity on the basis of prior criminal convictions, including misdemeanor obscenity convictions, contrary to Vance v. Universal Amusements, 445 U.S. 308 (1980)?
- II. Does the Dallas sexually oriented business license ordinance inevitably single out persons and businesses engaged in First Amendment protected activities for regulation and closure through the denial or revocation of a license contrary to Arcara v. Cloud Books, 478 U.S. 697, 92 L.Ed.2d 568, 106 S.Ct. 3175 (1986)?
- III. Does the Dallas sexually oriented business license ordinance violate the First and Fourteenth Amendments by failing to provide the procedural safeguards required by Freedman v. Maryland, 380 U.S. 51 (1965), National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977) and Vance v. Universal Amusement Co., 445 U.S. 308 (1980) after the denial or revocation of a license to present protected expression that results in a prior restraint?

#### LIST OF PARTIES BELOW

#### **PETITIONERS**

FW/PBS., Inc. d/b/a Paris Adult Bookstore II, a Texas Corporation

FW/PBS, Inc., d/b/a Paris Adult Video Center, a Texas Corporation

FW/PBS, Inc., d/b/a Filmworld, a Texas Corporation

DSB, Inc., d/b/a Denmark Bookstore, a Texas Corporation

Charles E. Carlock, d/b/a Paris Adult Bookstore I

Lone Star Multi Theatres, Inc., d/b/a New Fine Arts Adult Theatre, a Texas Corporation

Lone Star Multi Theatres, Inc., d/b/a La Cage, a Texas Corporation

Beverly K. Van Dusen, d/b/a Lone Star Bookstore

Beverly K. Van Dusen, d/b/a Elite Bookstore

Bill Staten, Jr., d/b/a Royal Lane Bookstore

Bill Staten, Jr., d/b/a New Venture Video

Bill Staten, Jr., d/b/a Mockingbird Lane News

BI-TI Enterprises, Inc., d/b/a Red Letter News, a Texas Corporation

Gattie Corporation, d/b/a Fantasy Land, a Texas Corporation

Gattie Corporation, d/b/a Video Land Arcade, a Texas Corporation

Gattie Corporation, d/b/a Video Stop, a Texas Corporation

J.R.E. Enterprises, d/b/a Kazbah Bookstore

Entertainment Unlimited, d/b/a Eros Dallas

## OTHER APPELLANTS IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Calvin Berry, III

Saujay Patel

Rudolph Fernandez

**Dallas Motel Association** 

Tempo Tamers, Inc., a Texas Corporation

Corporation Lex, Inc., a Texas Corporation

M.J.R., Inc., a Texas Corporation

Southern Belles Partnership, Inc., a Texas Corporation

S.B. LaBare, Inc., a Texas Corporation

S.B. Youngbloods, Inc., a Texas Corporation

D. Burch, Inc., a Texas Corporation

De Ja Vu, Inc., a Texas Corporation

Allen & Burch, Inc., a Texas Corporation

#### DEFENDANTS-APPELLEES:

The City of Dallas, Texas

Honorable Starke Taylor, Former Mayor of the City of Dallas

Chief Billy Prince, Former Chief of Police of the City of Dallas

#### AMICUS CURIAE:

Citizens for Decency Through Law, Inc. (CDL), an Ohio non-profit corporation headquartered in Phoenix, Arizona

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#### **OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on February 12, 1988 and is attached hereto in Appendix A to the Petition for Certiorari, p. 1. This opinion is reported as FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298 (5th Cir. 1988). The order denying the Petition for Rehearing and Suggestion for Rehearing En Banc is printed in Appendix B to the Petition for Certiorari, p. 31.

The opinion and judgment of the United States District Court for the Northern District of Texas (Dallas Division) was entered on September 12, 1986 and is reproduced in Appendix F to the Petition for Certiorari, p. 39. The opinion was reported sub nom Dumas v. City of Dallas, 648 F.Supp. 1061 (N.D. Tex. 1986).

#### JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 12, 1988. A timely filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 14, 1988. See Appendix B to the Petition for Certiorari, p. 31. The Petition for Certiorari was filed within ninety days of that date.

The Fifth Circuit Court of Appeals' decision is a final judgment since it affirmed the final judgment of the United States District Court which upheld the constitutionality of the Dallas sexually oriented business license ordinance, Dallas Municipal Code, Chapter 41A.

The Petition for Certiorari was filed on June 8, 1988. On February 27, 1989, this Court granted certiorari on Issues I, II and III and denied certiorari on Issue IV. This Court has jurisdiction in this civil action pursuant to 28 U.S.C. Section 2101(c).

#### CONSTITUTIONAL AND STATUTORY PROVISIONS

- A. United States Constitution, Amendment One

  Congress shall make no law...abridging the freedom
  of speech, or of the press....
- B. United States Constitution, Amendment Fourteen

  No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.
- C. Provisions of the Dallas Municipal Code

Dallas Revised Municipal Code Chapter 41A et. seq., (Ordinance 19196) enacted June 18, 1986 together with amendments to Chapter 41A enacted on October 12, 1986 (Ordinance 19377) are set forth verbatim at Appendices G and H to the Petition for Writ of Certiorari, pp. 71, 104. The current form of Chapter 41A of the Dallas Revised Municipal Code incorporating the amendments is included at p. 6 of the Joint Appendix.

#### STATEMENT OF THE CASE

Petitioners are engaged, at least in part, in what has been commonly referred to as the "adult entertainment business." Each of Petitioners operate its business in the City of Dallas, Texas, and each Petitioner sells, exhibits, or distributes publications, video or motion picture films. The materials sold or exhibited by Petitioners are presumptively protected speech material as guaranteed by the First and Fourteenth Amendments to the United States Constitution. These materials are made available in their various forms to consenting adults only.

On June 18, 1986, the City of Dallas, Texas, acting through its City Council, amended Dallas City Code, Chapter 41A ("sexually oriented businesses") by enacting Ordinance No. 19196. The added chapter, referred to herein, provides definitions for alleged "sexually oriented businesses," establishes an all-encompassing licensing and regulatory system for alleged "sexually oriented businesses," and provides a comprehensive scheme for enforcement of the ordinance. A copy of Ordinance No. 19196 is reprinted in Appendix G, Petition for Certiorari. The ordinance does not purport to regulate obscenity.

Petitioners filed the instant action challenging the constitutionality of Dallas City Code Chapter 41A which established a licensing and zoning scheme regulating "sexually oriented businesses." Petitioners sought preliminary and permanent injunctive relief as well as declaratory relief on June 30, 1986. Petitioners' action was consolidated with independent actions for declaratory and injunctive relief challenging Chapter 41A initiated by M.J.R., Inc., et al., Petitioners in Case No. 87-2051, and Calvin Berry, III, et al., Petitioners in Case No. 88-49. Pursuant to the District Court's order, Petitioners' constitutional claims were resolved through cross-motions for summary judgment. After a hearing, the court on September 12, 1986 upheld the constitutionality of the ordinance with the exceptions of Dallas City Code Sections 41A-5(a)(8), 41A-5(c), part of 41A-5(a)(10) ("under indictment"), and 41A-5(a)(10)(A)(iii), (vi-ix). The aforementioned sections were declared unconstitutional and were severed from the remainder of the ordinance which was held constitutional. Dumas v. City of Dallas, 648 F.Supp. 1041 (N.D. Tex. 1986).

Specifically, the District Court upheld the provisions, inter alia, that provided for the denial or revocation of a sexually oriented business license for the conviction of a criminal offense, including an obscenity conviction. Section 41A-5(A)(10) provides that issuance of a sexually oriented business license will be denied if "an applicant or an applicant's spouse has been convicted of a crime" listed in the ordinance. These crimes include:

- (aa) prostitution;
- (bb) promotion of prostitution;
- (cc) aggravated promotion of prostitution;
- (dd) compelling prostitution;
- (ee) obscenity;
- (ff) sale, distribution, or display of harmful material to minor;
  - (gg) sexual performance by a child;
  - (hh) possession of child pornography;
- (ii) any of the following offenses as described in Chapter 21 of the Texas Penal Code:
  - (aa) public lewdness;
  - (bb) indecent exposure;
  - (cc) indecency with a child;
- (iii) sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;
- (iv) incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code;
- (v) criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;

In the case of a misdemeanor conviction, a license will e denied if an applicant has been convicted or released from confinement within the last two years, determined from the later date. For a felony conviction or two misdemeanor convictions within a twenty-four (24) month period, the period is five years determined from the date of conviction or release from confinement, whichever date is later. Section 41A-10(b)(5) provides for the revocation of a license to engage in First Amendment activity where a licensee is convicted of any of the offenses set forth above. Section 41A-10(b)(6) provides for revocation of a license where two convictions of employees of the sexually oriented business of the enumerated criminal offenses occur within a twelve month period in or on the premises of the business.

The District Court invalidated several subsections of the original Section 41A-5(a)(10)(b) that set forth offenses that could be the basis for the denial of a license. Specifically, the District Court struck down Subsections 41a-5(a)(10)(A)(iii). (vi)-(ix) which listed the offenses of organized criminal activity, kidnapping, robbery, bribery, and controlled substance violations on the basis that the City failed to make any findings that "the offenses enumerated are sufficiently related to the purpose of the Ordinance." Dumas v. City of Dallas, 648 F.Supp. 1061, 1074 (N.D. Tex. 1986). The District Court also struck down the words "under indictment and misdemeanor information" from Subsection 41A-5(a)(10) as violative of the First Amendment. Id. at 1074. The remaining portions of Sections 41A-5 and 41A-10 were upheld with the exception of Subsection 41A-5(a)(10)(B)(c) which provided procedures for the granting of a sexually oriented business license after a conviction that vested unbridled discretion in the chief of police. Ia. at 1076.

The remainder of the ordinance was upheld. The District Court determined that the procedures contained within the ordinance for judicial review and appeal of the denial or revocation of a license to engage in First Amendment activity did not violate Freedman v. Maryland, 380 U.S. 51 (1965) and, in fact, comported with due process. The District Court also upheld the zoning provisions that imposed a dispersion requirement that sexually oriented businesses be one thousand (1000) feet from one another and which further required that such businesses be at least one thousand (1000) feet from any residential use or district, church, school or park.

Following the District Court's ruling on September 12, 1986, the Dallas City Council enacted Ordinance No. 19377 on October 12, 1986 which removed or amended the provisions invalidated by the District Court. A copy of Ordinance 19377 is reprinted at Appendix H to the Petition for Certiorari, p. 104.

Petitioners appealed the District Court's order to the United States Court of Appeals for the Fifth Circuit. During the pendency of the appeal, the City of Dallas rigorously enforced the challenged ordinance against sexually oriented businesses. Numerous such businesses were closed or forced out of business. As noted by the City in a sworn affidavit attached to its Response to Petitioner's Application for Stay and Recall of the Mandate, Dallas police officer Stephen Foster stated that one sexually oriented business license was denied on the basis of a prior obscenity conviction which denial was later reversed on appeal. Officer Foster further testified that two licenses were revoked on the basis of an obscenity conviction. In addition, Foster stated that of 165 applications for licenses, 147 were issued. Thus, eighteen licenses to operate sexually

oriented businesses were denied for various reasons during the pendency of the appeal.

On February 12, 1988, the Fifth Circuit affirmed the District Court's opinion. FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298 (5th Cir. 1988). See Appendix A to Petition for Certiorari, p. 1. The Fifth Circuit upheld the denial or revocation of a license based upon criminal convictions stating, "the City need only show that conviction and the evil to be regulated bear a substantial relationship." Id. at 1305. The Fifth Circuit determined the ordinance was "well tailored sufficiently to achieve its ends" by providing for the denial or revocation of a license to engage in protected First Amendment activity for criminal convictions. Id. Judge Thornberry dissented from this holding, stating that the right to engage in free speech cannot be denied based upon a person's criminal history. Id. at 1311-1312.

The Fifth Circuit also determined that the procedural safeguards required by Freedman v. Maryland, 380 U.S. 51 (1965) were not required for the licensing ordinance under the time, place and manner analysis set forth in City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986). The Fifth Circuit further stated that the Freedman procedures were also not required because sexually explicit films and publications were entitled to a lesser degree of First Amendment protection and that Freedman procedures were less important "when a regulation restricts the conduct of an ongoing commercial business." FW/PBS, Inc., v. City of Dallas, supra, 837 F.2d at 1302-1303.

Judge Thornberry dissented, asserting that since "the denial of a license to engage in speech is... the classic prior restraint," the *Freedman* procedural safeguards were required. *Id.* at 1307-1308. The dissent further noted that the majority's analysis of the ordinance as a time, place and manner regulation was inappropriate because the denial of

a license would not leave open any alternative avenues of communication unlike the zoning ordinance upheld in *Renton*. *Id*. at 1309.

The panel upheld all other aspects of the Dallas ordinance including the zoning regulations. Judge Thornberry dissented with regard to Section 41A-5(a)(6) requiring health, fire and building code approval prior to licensing as well as Section 41A-7 permitting warrantless inspections since these provisions singled out sexually oriented businesses for special scrutiny without any justification.

Petitioners timely filed a Petition for Rehearing En Banc which Petition was denied on March 14, 1988. See Appendix B to the Petition for Certiorari, p. 31. On March 17, 1988, Petitioners filed a Motion to Stay Issuance of the Mandate Pending Application for Writ of Certiorari to the United States Supreme Court pursuant to F.R.A.P. 41(a). The Fifth Circuit denied this Motion on April 5, 1988. See Appendix C to the Petition for Certiorari, p. 33. On April 14, 1986, Petitioners filed an Application for Recall and Stay of Mandate of United States Court of Appeals for the Fifth Circuit.

On April 20, 1988, Justice White, Circuit Justice for the Fifth Circuit, ordered that the judgment and mandate of the United States Court of Appeals for the Fifth Circuit be stayed pending further order by the Circuit Justice or the full Court. See Appendix D to the Petition for Certiorari, p. 37. On May 4, 1988, the Supreme Court entered an order staying the judgment and mandate of the United States Court of Appeals for the Fifth Circuit with the exception of the portion of the judgment affirming the zoning regulations of sexually oriented businesses. See Appendix E to the Petition for Certiorari, p. 38.

#### SUMMARY OF ARGUMENT

1. Dallas Municipal Code Chapter 41A regulates sexually oriented businesses through licensing. The ordinance regulates businesses disseminating sexually explicit expression that is presumptively protected by the First Amendment.

Chapter 41A provides for the denial or revocation of a license to present expression if an applicant or their spouse has been convicted of a crime listed in the ordinance which includes obscenity violations. The denial of such a license for a past criminal conviction results in an absolute prior restraint on future expression. This Court has consistently and unequivocally imposed a heavy burden to justify any system of prior restraint. The Fifth Circuit clearly erred in requiring that only a substantial relationship need exist between the enumerated offenses and the government interest of controlling crime in order to justify Chapter 41A.

Moreover, the denial of a license to engage in protected expression on the basis of a prior obscenity conviction is contrary to the Court's decision in *Vance v. Universal Amusement*, 445 U.S. 308 (1980). In *Vance*, the Court held that the application of a public nuisance statute to enjoin the future exhibition of allegedly obscene motion pictures on the basis of a showing that obscene films had been

exhibited in the past, was an unconstitutional prior restraint. Chapter 41A, in fact, presents an even greater danger to expression because the future exhibition of non-obscene material will result when a license is denied or revoked.

This Court in Arcara v. Cloud Books, Inc., 478 U.S. 647, 53 L.Ed.2d 568, 106 S.Ct. 3172 (1986) held that a nuisance statute of general application could be applied against the physical premises of a bookstore where non-expressive criminal activity has been shown to have occurred. The Court specifically stated that the First Amendment would be implicated "where a statute based upon non-expressive activity has the inevitable effect of singling out those engaged in expressive activity." Id. at 706-707. In addition, the Court stressed in Arcara that no prior restraint existed because the bookstore was "free to carry on [the] bookselling business at another location." Id. at 705, n. 2.

Chapter 41A, by its own terms, inevitably singles out sexually oriented businesses engaged in expressive activity for regulation on the basis of both expressive and non-expressive activity. Moreover, as noted by every court below, the denial or revocation of a license under Chapter 41A results in the absolute denial of the right to carry on one type of speech within the City of Dallas. Moving to a new location is not an option as in *Arcara*. As such, Chapter 41A is contrary to the express language of *Arcara* and is, thus, unconstitutional.

3. "The settled rule is that a system of prior restraint avoids constitutional infirmity only if it takes place under procedural safeguards to obviate the dangers of a censor-ship system." Southeastern Promotions, Ltd. v. Conrad, 420

U.S. 546, 558 quoting Freedman v. Maryland, 380 U.S. 51 (1965). See also Riley v. National Federation of the Blind, \_\_\_\_\_ U.S. \_\_\_\_, 101 L.Ed.2d 669, 108 S.Ct. \_\_\_\_ (1988). The procedural safeguards required by these cases are notably absent in Chapter 41A. Section 41A-11 sets forth the p.ocedures to be followed in the event a license is denied, suspended or revoked. This section suffers from the following defects:

 a. It places the burden on the licensee to seek review and go forward with proving the invalidity of the challenged ruling;

No provision exists mandating a prompt determination of the appeal; and

c. No provision exists that assures a prompt, final judicial determination.

Because the denial or revocation of a license under Chapter 41A imposes an absolute prior restraint upon one type of expression within the City of Dallas, the omission of the procedural safeguards required by *Freedman* renders the ordinance unconstitutional.

#### **ARGUMENT**

I. DAJ.LAS MUNICIPAL CODE SECTIONS
41A-5(A)(10) AND 41A-10(B)(5) AND (6) IMPOSE AN
IMPERMISSIBLE PRIOR RESTRAINT UPON
PROTECTED EXPRESSION BY PROVIDING FOR
THE DENIAL OR REVOCATION OF A SEXUALLY
ORIENTED BUSINESS LICENSE ON THE BASIS
OF PRIOR CRIMINAL CONVICTIONS CONTRARY
TO VANCE V. UNIVERSAL AMUSEMENT CO.,
445 U.S. 308 (1980)

Chapter 41A imposes regulations upon businesses that present various forms of entertainment that is characterized by the depiction of "nudity," "specified sexual activities" or "specified anatomical areas" as defined in Sections 41A-2. The ordinance does not purport to regulate obscenity.

It is well settled that obscenity is not protected by the First Amendment. Miller v. California, 413 U.S. 15 (1973) reh. denied, 414 U.S. 881. It is equally well settled that nonobscene sexually explicit expression is protected by the First Amendment. Schad v. Borough of Mount Ephraim. 452 U.S. 61 (1981). See e.g. Fort Wayne Books, Inc. v. Indiana U.S. \_\_\_\_, 57 USLW 4180, No. 87-470; sl.op. p. 15 (Fourth Amendment rules are stricter "when materials presumptively protected by the First Amendment are involved"). Moreover, a majority of the justices in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) concluded that the degree of protection the First Amendment affords speech does not vary with the social value ascribed to that speech by the courts. As Justice Powell stated in the Young concurring opinior. "I do not think we need reach, nor am I inclined to agree with, the holding ... that non-obscene.

erotic materials may be treated differently under First Amendment principles from other forms of protected expression." *Id.* at 73, n. 1.<sup>1</sup> Thus, there can be no question that the speech regulated by Chapter 41A is protected by the First Amendment.

As previously noted, Dallas Municipal Code Section 41A-5(A)(10) provides that issuance of a sexually oriented business license will be denied if "an applicant or an applicant's spouse has been convicted of a crime" listed in the ordinance. Section 41A-10(B)(5) provides for the revocation of a license to engage in First Amendment activity where a licensee is convicted of any of the listed offenses. A total of two convictions of the listed offenses by employees of a sexually oriented business within a twelve month period will also support revocation of a license. Section 41A-10(B)(C).

The United States Supreme Court in Vance v. Universal Amusement Co., 445 U.S. 308 (1980) held that the application of a public nuisance statute to enjoin the future exhibition of allegedly obscene motion pictures on the basis of a showing that obscene films had been exhibited in the past, was an unconstitutional prior restraint. The majority opinion stated, "the burden of supporting an injunction against future expression is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication." Id., at 315-316. See also Southeastern

<sup>1</sup> Numerous other federal circuits have adopted this position of the five justices in Young. See Kev v. Kitsap County 753 F.2d 1053, 1058 (9th Cir. 1986); United States v. Guarino, 729 F.2d 864, 868 n. 4 (1st Cir. 1984) (en banc); Avalon Cinema Corp. v. Thompson, 667 F.2d 659, 663 n. 10 (8th Cir. 1981) (en banc); Hart Bookstores, Inc. v. Edmisten, 612 F.2d 821, 826-828 (4th Cir. 1979) cert. denied, 447 U.S. 929 (1980). See also Pensack v. City and County of Denver, 630 F. Supp. 177, 180 (D. Colo. 1986).

Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-559 (1975); Near v. Minnesota, 283 U.S. 697 (1931).<sup>2</sup>

Justice White, in his *Vance* dissenting opinion, asserted that the Texas injunction procedure at issue there did not constitute a prior restraint:

Prior restraints are distinct from, and more dangerous to free speech than, criminal statutes because, through caprice, mistake, or purpose, the censor may forbid speech which is constitutionally protected, and because the speaker may be punished for disobeying the censor even though his speech was protected. Those dangers are entirely absent here. As injunction against the showing of unnamed obscene motion pictures does not and cannot bar the exhibitor from showing protected material, nor can the exhibitor be punished, through contempt proceedings, for showing such material. Id., at 324.

The dangers of prior restraints on expression identified by Justice White in his Vance dissent are entirely present under the challenged Dallas licensing scheme. Under any definition, a prior restraint exists in the instant case. The effect of the challenged Dallas sexually oriented business license ordinance is to completely deny the ability of a person or their spouse to engage in an area of protected expression within the entirety of the City of Dallas if that person has been convicted of one the enumerated crimes. As the District Court recognized in its opinion, "denial of a license amounts to an absolute suppression of expression." Dumas v. City of Dallas, 648 F.Supp. 1061, 1074 n. 37. Thus, a misdemeanor conviction for obscenity, display of materials harmful to minors, or other crimes will result in the complete restraint of a person from engaging in protected conduct.3 Such a person is subject to punishment for presenting expression without a license even though the expression is protected by the First Amendment.

The United States Supreme Court has vigorously and repeatedly condemned any system of prior restraint of First Amendment rights. Near v. Minnesota ex rel Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). See Fort Wayne Books, Inc. v. Indiana, \_\_\_ U.S. \_\_\_, 57 USLW 4180, 4185,

<sup>2</sup> Numerous other federal and state courts have held that business licenses regulating First Amendment activities cannot be denied or revoked on the basis of previous obscenity or other criminal convictions. See City of Paducah v. Investment Entertainment, Inc., 791 F.2d 463 (6th Cir. 1986) cert. denied, 479 U.S. 915, 93 L.Ed.2d 290 (1986); Gayety Theatres, Inc. v. City of Miami, 719 F.2d 1550 (11th Cir. 1983); Fernandes v. Limmer 663 F.2d 619, 636 (5th Cir. 1981) cert. dismissed, 458 U.S. 1124 (1982); International Sov. for Krishna Consciousness v. Eaves, 601 F.2d 809, 832-833 (5th Cir. 1979); Cohen v. City of Daleville, 695 F.Supp. 1168 (M.D. Ala. 1988); Holy Spirit Ass'n v. Hodge, 582 F.Supp. 592 (N.D. Tex. 1984); Cornflower Entertainment, Inc. v. Salt Lake City Corp., 485 F.Supp. 777 (D. Utah 1980); Yuclan Enterprises, Inc. v. Arre, 488 F.Supp. 820 (D. Hawaii 1980); Bayside Enterprises, Inc. v. Carson, 470 ESupp. 1140 (M.D. Fla. 1979); San Juan Liquors v. Consol. City of Jucksonville, 480 F.Supp. 151 (M.D. Fla. 1979); Natco Theatres, Inc. v. Ratner, 463 F.Supp. 1124 (S.D.N.Y. 1979); Avon. 42nd Street Corp. v. Myerson, 352 FSupp. 994 (S.D.N.Y. 1972); Oregon Bookmark Corp. v. Schrunk, 321 F.Supp. (D. Oregon 1970); Perrine v. Municipal Court, 5 Cal. 3d 656, 97 Cal.Rptr. 320, 488 P2d 648 (1971) cert. den 404 U.S. 1038 (1972); Kuhns v. Santa Cruz Co.Bd. of Sup'rs, 128 Cal. App. 3d 369, 374-375, 181 Cal.Rptr. 1, 3-4 (1982); City of Delevan v. Thomas, 31 Ill.App. 3d 630, 334 NE2d 190 (1975); Alexander v. City of St. Paul, 303 Minn. 201, 227 NW2d 370 (Minn. 1975); Hamar Theatres, Inc. v. City of Newark, 150 N.J. Super. 14, 374 A.2d 502 (1977); Colonie Theater v. City of Schenectady, 89 A.D.2d 631, 453 N.Y.S. 2d 94 (1982); People v. J.W. Productions, 413 N.Y.S. 2d 552 (N.Y.C.Cr.Ct. 1979); City of Seattle v. Bittner, 81 Wash. 2d 747, 505 P2d 126 (1973) Cf. State v. Bauer, P2d. \_\_\_\_\_, Ariz. Ct. App. No. CR-147826 (Dec. 13, 1988); Southland News Co., Inc. v. People, 143 III.App. 3d 97, 493 NE2d 398 (III.App. 1986).

87-470, sl.op. p. 18 (Feb. 21, 1989). The constitutional protection against illegal prior restraints is so exalted that an unconstitutional licensing law may be ignored, and one within its purview may engage with impunity in the exercise of his rights. Shuttlesworth v. Birmingham, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969); ACORN v. Golden, 744 F.2d 739 (10th Cir. 1984).

In determining the existence of an impermissible prior restraint, we begin with the premise that:

Any system of prior restraint ... 'comes to this Court bearing a heavy presumption against its constitutional validity.' Bantam Books, Inc. v. Sullivan, 372 U.S. [58] at 70, 9 L.Ed.2d 584; New York Times Co. v. United States, 402 U.S. [713] at 714, 29 L.Ed.2d 822; Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 29 L.Ed.2d 1, 91 S.Ct. 1575 (1971); Carroll v. Princess Anne, 383 U.S. 175, 181, 21 L.Ed.2d 325, 89 S.Ct. 347 (1968); Near v. Minnesota ex rel. Olson, 283 U.S. [659] at 716, 75 L.Ed. 1357. The presumption against prior restraints is heavierand the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable. See Speiser v. Randall, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958). Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-559 (1975) (Emphasis in original).

Near v. Minnesota, 283 U.S. 657, 51 S.Ct. 625, 75 L.Ed. 1357 (1931) probably best articulates the rationale for the heavy presumption against prior restraints. In overturning the trial court's order enjoining the further publication of a newspaper because of its past offensive content, the Court focused on the historical meaning of freedom of the press and the need for freedom of speech in a free society. The Court quoted Blackstone as stating:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press... 283 U.S. at 713-14. (Emphasis in original).

The United States Supreme Court recognized that the Gramers of the Constitution adhered to Blackstone's views that free speech is necessary to a free society and includes prohibitions against prior restraints. In its opinion in Near, James Madison was quoted as stating:

|T|he great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also. *Id.* at 714.

This statement of fundamental principles was strong authority that the Constitution required a prohibition against nearly all prior restraints. Equally important to the Court was its own view that prior restraints, if permitted, would provide a means to halt the free exchange of ideas. Moreover, the difficulty of suppressing unprotected speech without inhibiting protected speech supported a prohibition against restraining speech prior to its utterance.

While it was recognized that this prohibition would allow some offensive expression, the Court concluded that the alternative created too great a risk of censorship and was, thus, unacceptable. Again, Madison was quoted with approval:

Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits. Near v. Minnesota, Id. at 718.

Thus, the framers of the Constitution recognized that the possibility of abuse of the First Amendment that could give rise to a criminal penalty or civil liability could not justify restraining future expression.

Pursuant to this fundamental judicial intolerance for systems of prior restraint, the Supreme Court has consistently placed upon the government a heavy burden of establishing a justification for the imposition of a prior restraint. See e.g. Organization for a Better Austin v. Keefe, 402 U.S. 415 29 L.Ed.2d 1, 81 S.Ct. 1575 (1975); New York Times Co. v. United States, 403 U.S. 713, 29 L.Ed.2d 822, 81 S.Ct. 2140 (1971); Freedman v. Maryland, 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 (1965).

Therefore, the central focus of the inquiry becomes whether the Dallas sexually oriented businesses licensing scheme in fact constitutes a system of prior restraint, thus giving rise to a strong presumption against its constitutional validity. In this regard, the ordinance must be examined not in the context of mere matters of form, but rather, it must be examined in the context of its operation and effect. Near v. Minnesota, 283 U.S. 697 (1931). See also Fort Wayne Books, Inc. v. Indiana, \_\_\_\_ U.S. \_\_\_\_, No. 87-470, 57 USLW 4180, 4185, sl.op p. 18 (Feb. 21, 1989). Courts should "look through forms to the substance and recognize that informal censorship may ... inhibit the circulation of publications." Bantam Books, Inc. v. Sullivan, supra, 372 U.S. at 67.

Every court to examine the ordinance in this case has recognized that the operation and effect of the ordinance results in the complete suppression of future protected expression. The District Court determined that "denial of a license amounts to an absolute suppression of expression." Dumas v. City of Dallas, 648 F.Supp. 1061, 1074 n. 37. See Appendix F to Petition for Certiorari, p. 67. Both the Fifth Circuit majority and dissenting opinions also recognized the severity of this portion of the ordinance. "This part of the Ordinance does not simply regulate the manner of protected activity. It denies the right of persons convicted of certain crimes to engage in the regulated business." FW/ PBS v. City of Dallas, 837 F.2d 1298, 1304. Appenix A to Petition for Certiorari, p. 11. "The denial of a license to engage in speech is, however, the classic prior restraint." (J. Thornberry dissenting) Id. at 1307. Appendix A to Petition for Certiorari, p. 19. "The denial of a license is a complete ban on speech." (J. Thornberry dissenting) Id. at 1307, Appendix A to Petition for Certiorari, p. 23.

The District Court reasoned that "denial of licensure to those convicted of certain specified crimes that are related to the crime-control intent of the law is undoubtedly permitted." Dumas v. City of Dallas, 678 F.Supp. 1061, 1073, Appendix F to Petition for Certiorari, p. 53. This determination was based upon this Court's decision in Arcara v. Cloud Books, Inc., 478 U.S. 647, 92 L.Ed.2d 508, 106 S.Ct. 3175 (1986). The Fifth Circuit majority adopted a different approach without any mention of Arcara. The panel determined that, "the City need only show that conviction and the evil to be regulated bear a substantial relationship." FW/PBS v. City of Dallas, supra, 837 F.2d 1298, 1305, Appendix A to Petition for Certiorari, p. 13.

The differing analyses of both courts below are both contrary to the consistent decisions of this Court. As discussed supra, this Court has never hinted that the imposition of an absolute prior restraint on expression can be imposed merely to advance a substantial government interest. Rather, to sustain a prior restraint on protected expression, the government must show that the speech prohibited will "surely result in direct, immediate and irreparable damage ... " New York Times Co. v. United States, 403 U.S 713, 730, 91 S.Ct. 2140, 2149, 29 L.Ed.2d 822 (1971) (Stewart J. concurring) quoted in Fernandes v. Limmer, 663 F.2d 419 (5th Cir. 1981) cert. dismissed, 458 U.S. 1124 (1982). The opinions in New York Times Co. v. United States, supra, clearly reveal that the government will not carry its "heavy burden of showing justification for the imposition of such a restraint" merely by the invocation of a substantial governmental interest in controlling crime. Thus, the Fifth Circuit's decision upholding the licensing provisions wholly fails to follow the previous unequivocal statements of this Court requiring the highest possible level of justification to uphold a prior restraint on expression.

## II. THE DALLAS ORDINANCE INEVITABLY SINGLES OUT BUSINESSES ENGAGED IN PROTECTED FIRST AMENDMENT EXPRESSION CONTRARY TO ARCARA V. CLOUD BOOKS, INC. 478 US 647, 92 L.ED.2D. 568.

478 US 647, 92 L.ED.2D. 568, 106 S.CT 3172 (1986).

An examination of Arcara v. Cloud Books, Inc., 478 U.S. 647, 53 L.Ed.2d 568, 106 S.Ct. 3172 (1986), relied upon by the District Court but conspicuously absent from the Fifth Circuit panel's analysis, lends further support to Petitioners' position that the challenged ordinance is violative of the First Amendment. In Arcara, this Court upheld the use of a general public nuisance statute to close an adult bookstore for a period of one year when used as a place of prostitution. The Court was careful to note the nuisance statute was of general application that did not "inevitably single out bookstores or others engaged in First Amendment protected activities for the imposition of its burden... "Id. at 705. Moreover, the Court stressed that the bookstore closed under the general nuisance statute "remain[ed] free to sell the same materials at another location." Id. at 705.

The Court also discussed the danger of prior restraint resulting from the closure of the bookstore. Chief Justice Burger stated:

The closure order sought in this case differs from a prior restraint in two significant respects. First, the order would impose no restraint at all on the dissemination of particular materials, since respondent is free to carry on his bookselling business at another location, even if such locations are difficult to find. Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited—indeed, the imposition of the

closure order has nothing to do with any expressive conduct at all. Id. at 705 n. 2. (emphasis added)

The Court stated that First Amendment concerns were not implicated in Arcara because the nuisance statute based upon non-expressive illegal conduct did not impose a disproportionate burden upon those engaged in expressive activity. However, First Amendment concerns would be implicated "where a statute based on non-expressive activity has the inevitable effect of singling out those engaged in expressive activity." Arcara v. Cloud Books, Inc., supra, 478 U.S. at 706-707. For example, a tax imposed on the sale of large quantities of newsprint and ink was held to be unconstitutional "because the tax had the effect of singling out newspapers to shoulder its burden" in Minneapolis Star v. Minnesota Commissioner of Revenue, 460 U.S. 575, 75 L.Ed.2d 295, 103 S.Ct. 1365 (1983). Arcara, 478 U.S. 697, 704. Thus, based upon the situation in Arcara, the Court specifically held that "the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books." Arcara v. Cloud Books, Inc., supra, 478 U.S. at 707.

Justice O'Connor, in a concurring opinion joined by Justice Stevens, was careful to note that analysis under the First Amendment would be appropriate in other situations:

If, however, a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review. *Id.* at 708 (J. O'Connor concurring, joined by J. Stevens).

Quoted in part in Fort Wayne Books v. Indiana. \_\_\_\_ U.S. \_\_\_\_, 57 USLW 4180, 4185, No. 87-470, sl.op.p. 18, (Feb. 21, 1989).

The ordinance upheld in the instant case imposes an absolute restraint on constitutionally protected expression. Unlike Arcara, the Dallas licensing scheme is not directed at physical premises, but rather is directed at an individual. As discussed, supra, denial or revocation of a license to operate a sexually oriented bookstore or theater will result in the absolute suppression of the ability to engage in that protected First Amendment activity within the City of Dallas. Moving to a new location is not an available possibility as in Arcara. As stated by Judge Thornberry in his dissenting opinion, "[a] person banned from speech because, for example, he has in the past been convicted of some crime has no other avenue of communication." FW/PBS v. City of Dallas, 837 F.2d 1298, 1310; Appendix A to Petition for Certiorari, p. 24.

Moreover, the Dallas ordinance has the "inevitable effect of singling out" for regulation those engaged in one particular aspect of expressive activity based upon the content of the expression. As such, these Dallas ordinances providing for the denial or revocation of a license to operate a sexually oriented business must be considered under a First Amendment mode of analysis which both lower courts failed to do.

The Fifth Circuit decision in the instant case is also in direct conflict with the decision in Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980) which invalidated several regulations directed solely at adult bookstores. See FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1310-1311 (J. Thornberry dissenting). In Genusa, the Seventh Circuit struck down a requirement for the warrantless safety

inspections of adult bookstores since "there is nothing in the record to indicate that adult bookstores, as a class, contain more faulty light switches or other violations than regular bookstores, as a class." Genusa v. City of Peoric, supra, 619 F.2d at 1214. In the instant case, similar provisions in Sections 41A-5(a)(6) and 41A-7 of the Ordinance were upheld over Judge Thornberry's dissent. FW/PBS, Inc. v. City of Dallas, supra, at 1310-1311. Moreover, numerous other regulations contained in the ordinance expressly single out the content of the expression for onerous limitation. See e.g. Section 41A-19, entitled "Regulations Pertaining to Exhibition of Sexually Explicit Films or Videos" which mandates the configuration of theaters exhibiting such films.

III. THE DALLAS SEXUALLY ORIENTED BUSINESS
LICENSE ORDINANCE FAILS TO PROVIDE THE
PROCEDURAL SAFEGUARDS NECESSARY TO
PROTECT FIRST AMENDMENT RIGHTS
CONTRARY TO FREEDMAN V. MARYLAND,
380 U.S. 51 (1965), NATIONAL SOCIALIST PARTY V.
VILLAGE OF SKOKIE, 432 U.S. 43 (1977), AND VANCE
V. UNIVERSAL AMUSEMENT CO., 445 U.S. 308 (1980)

This Court has repeatedly stated that "[a]ny system of prior restraint on expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 53, 70 (1963) quoted with emphasis added by Court in Vance v. Universal Amusement, 445 U.S. 308, 317 (1980). See also New York Times v. United States, supra, 403 U.S. 713. "The settled rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system."

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 quoting Freedman v. Maryland, 380 U.S. 51 (1965).

In Freedman, this Court held that a system of prior restraint runs afoul of the First Amendment if it lacks any of three safeguards:

First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and for purpose of preserving the status quo. Third, a prompt final judicial determination must be assured. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) (Emphasis supplied).

The Court's recent decision in Riley v. National Federation of the Blind of North Carolina. \_\_\_\_ U.S. \_\_\_\_, 101 L.Ed.2d 669, 108 S.Ct. \_\_\_\_ (1988) further supports this principle. In Riley, the Court declared a North Carolina charitable solicitation licensing statute violative of the First Amendment that: (1) placed specified limits on a reasonable fee a fundraiser could charge; (2) required disclosures to potential donors; and (3) did not require the issuance of a license within a specified brief period. The Court required that the licensing statute regulating First Amendment activity in Riley "must provide that the licensor 'will, within a specified brief period, either issue a license or go to court.' Freedman v. Maryland, 380 U.S. 51, 59 (1965)." Id.

Like the statute declared unconstitutional in *Riley*, the Dallas sexually oriented business licensing ordinance does not provide the procedural safeguards of *Freedman v. Maryland*, 380 U.S. 51 (1965).

Section 41A-11 of the challenged ordinance sets forth the procedures in the event a license is denied, suspended or revoked. The procedure utilized herein violates the *Freedman* requirements in three ways. First, it places the burden on the licensee to seek review and to go forward with proving the invalidity of the challenged ruling. Second, no provision is present mandating a prompt determination of the appeal. Third, no provision is present that *assures* a prompt, final judicial determination. *See National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977).

While Section 41A-11 creates a mechanism for an adminstrative appeal to a permit and license appeal board, the ordinance does not require: (1) The chief of police to institute prompt judicial proceedings in which he bears the burden of justifying his refusal to issue the requested license; (2) assurance that any interim restraint imposed pending judicial resolution on the merits will be of brief duration; and (3)-a-guarantee of swift final judicial action. The lack of these procedures results in the "absolute suppression of expression" through the denial or revocation of a sexually oriented business license without any of the procedural safeguards required by Freedman. Without these procedural safequards, a final judicial decision on the granting or denial of a license to present protected expression may be delayed indefinitely resulting in a restraint of First Amendment rights.

The Fifth Circuit decision in the instant case is in direct conflict with numerous federal appellate decisions, including Fifth Circuit decisions, as well as the aforementioned decisions of this Court. Three circuits have made clear that Freedman procedural safeguards are applicable to the denial of a license to operate an adult or sexual oriented

business. City of Paducah v. Investment Entertainment, Inc., 791 F.2d 463 (6th Cir. 1986) cert. denied, 479 U.S. 915, 93 L.Ed.2d 290 (1986); Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), cert. denied 480 U.S. 919 (1981); 754 Orange Ave., Inc. v. City of West Haven. 761 F.2d 105, 114 (2d Cir. 1985) (dictum).4 Several other federal circuits have held that the denial or revocation of a business license regulating First Amendment activities requires Freedman procedural safeguards to be constitutional. Central Florida Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1526 (11th Cir. 1985) (adopting concurring opinion analysis); Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d 666, 675-676 (11th Cir. 1984) cert. denied, \_\_\_ U.S. \_\_\_, 106 S.Ct. 1637 (1985); Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981) cert. dismissed, 458 U.S. 1124 (1982); ISKON v. Rochford, 585 F.2d 263 (7th Cir. 1978),5

This Court's requirement of Freedman procedural safe-guards applies to any prior restraint, regardless of whether the prior restraint is imposed through the means of pretrial seizure rejected in Fort Wayne Books, the injunction procedure rejected in Near and Vance, or the denial of a lickness to present protected expression rejected in Freedman, Southeastern Promotions, and Riley. Lacking such safeguards to obviate the dangers of a prior restraint created by a system of licensing protected expression, the challenged ordinance will inevitably result in the unlawful restraint of First Amendment freedoms. As stated by this Court, "The

<sup>4</sup> See also Wendling v. City of Duluth, 495 F.Supp. 1380 (D.Minn. 1980), Cf. Southland News, Inc. v. People, 143 Ill.App. 3d 371, 473 NE2d 398 (1986).

See also Holy Spirit Assn v. Hodge, 582 F.Supp. 592 (N.D. Tex. 1984); ISKON, Inc. v. Schmidt, 523 F. Supp. 1303 (D. Md. 1981).

loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury per se." *Elrod v. Burns*, 427 U.S. 347, 373 (plurality opinion). Based upon the grave danger to free expression caused by the denial of license, and the lack of attendant procedural safeguards required by numerous decisions of this Court, Chapter 41A should be declared unconstitutional by the Court.

#### CONCLUSION

Based on the foregoing arguments and authorities, Petitioners respectfully request this Honorable Court to reverse the judgment of the United States Court of Appeals for the Fifth Circuit and declare Dallas Municipal Code 41A unconstitutional in its entirety and award attorneys fees, costs, and any other relief this Court deems appropriate.

Dated: April 12, 1989.

Respectfully submitted,

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# RESPONDENT'S

# BRIEF

Non. 87-2012, 87-2051, and 86-4

ELUED

In The

## Supreme Court of the United State

October Term, 1989

NO. 87-2012

FW/PBS, INC., et al.,

W.

Petitioners,

CITY OF DALLAS, TEXAS, et al.,

Respondents.

NO. 87-2051

M.J.R., INC., et al.,

W.

Petitioners,

CITY OF DALLAS, TEXAS, et al.,

Respondents.

NO. 88-49

CALVIN BERRY, III, et al.,

V.

Petitioners,

CITY OF DALLAS, TEXAS, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS CITY OF DALLAS, et al.

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#### **QUESTIONS PRESENTED**

- 1. Does the temporary denial or revocation of a license to operate a sexually oriented business based on convictions for specified crimes that are demonstrated to proliferate in neighborhoods surrounding such businesses, impose a prior restraint on protected expression or improperly single out businesses engaged in First Amendment protected activities?
- 2. Are the procedural safeguards required by Freedman v. Maryland, 380 U.S. 51 (1965), applicable to the license denial and revocation provisions of the Dallas sexually oriented business ordinance?
- 3. Do the provisions of the Dallas sexually oriented business ordinance relating to adult motels violate the First, Fourth, Fifth and Fourteenth Amendments or any constitutionally protected freedom of association?

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In The

#### Supreme Court of the United States

October Term, 1989

NO. 87-2012 FW/PBS, INC., et al.,

Petitioners,

CITY OF DALLAS, TEXAS, et al.,

Respondents.

NO. 87-2051 M.J.R., INC., et al.,

Petitioners,

CITY OF DALLAS, TEXAS, et al.,

Respondents.

NO. 88-49 CALVIN BERRY, III, et al.,

Petitioners,

CITY OF DALLAS, TEXAS, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS CITY OF DALLAS, et al.

#### STATEMENT OF THE CASE

In the early summer of 1986, after a thorough investigation of the facts and law involved (DX 3), the City of Dallas began to consider specific means of regulating the deleterious effects of sexually oriented businesses upon the community.

The first formal consideration of a proposed ordinance occurred at a public hearing before the Dallas Plan Commission on June 12, 1986. After considering the experiences of at least eight other cities and counties (DX 3 and DX 5), the testimony of numerous citizens (DX 1 and DX 2 p. 2), and evidence concerning possible locations available under the ordinance (DX 15), the fifteen member Plan Commission voted unanimously in favor of adopting the ordinance. The transcript of the Plan Commission hearing shows that the Plan Commission was convinced that sexually oriented businesses cause harmful secondary effects to surrounding neighborhoods (DX 1 pp. 23, 49, 51-52, 57-58) and that the members of the Plan Commission were attempting to control these secondary effects and not the content of sexually oriented materials (DX 1 pp. 23, 48-52, 57).

The Dallas City Council considered the Plan Commission's unanimous recommendation as well as the eight municipal studies and the map indicating available locations. The City Council also considered a Dallas study which found a 90 percent higher crime rate near sexually oriented businesses than in other business areas (DX 19 and 20). On June 18, 1986, the Dallas City Council voted unanimously in favor of adopting Ordinance No.

19196, which added a new Chapter 41A (the Dallas ordinance) to the Dallas City Code.

In adopting the ordinance, the Council made legislative findings that sexually oriented businesses are frequently used for unlawful sexual activities, have a deleterious effect on surrounding businesses and neighborhoods, and cause increased crime and decreased property values.<sup>1</sup>

- Sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature;
- (2) that the city police have made a substantial number of arrests for sexually related crimes in sexually oriented business establishments;
- (3) that concern over sexually transmitted diseases is a legitimate health concern of the city which demands reasonable regulation of sexually oriented businesses in order to protect the health ard well-being of the citizens;
- (4) that licensing is a legitimate and reasonable means of accountability to ensure that operators of sexually oriented businesses comply with reasonable regulations and to ensure that operators do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation;
- (5) that there is convincing documented evidence that sexually oriented businesses, because of their very (Continued on following page)

<sup>&</sup>lt;sup>1</sup> The Dallas City Council made the following findings:

The ordinance requires sexually oriented businesses to locate at least 1000 feet from a church, school, residential district, park adjacent to a residential district, a residential lot, or another sexually oriented business.

(Continued from previous page)

nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values;

- (6) that sexually oriented businesses have serious objectionable operational characteristics particularly when they are located in close proximity to each other, thereby contributing to urban blight and downgrading the quality of life in adjacent areas;
- (7) that it is in the interest of public safety and welfare to prohibit persons convicted of certain crimes from engaging in the occupation of operating sexually oriented businesses;
- (8) that the crimes listed in Section 41A-5(a)(10) are serious crimes which are directly related to the duties and responsibilities of the occupation of operating sexually oriented businesses;
- (9) that the occupation of operating sexually oriented businesses brings a person into constant contact with persons interested in sexually oriented materials and activities thereby giving the person repeated opportunities to commit offenses against public order and decency should he be so inclined; and
- (10) that a person who has been convicted of a crime listed in Section 41A-5(a)(10) is presently unfit to operate any sexually oriented businesses until the respective time periods designated in that section expire. (DX 16, pp. 1-5).

§ 41A-13(a) & (b). A three-year amortization period was provided for nonconforming uses. § 41A-13(f). Licensing requirements were imposed to assist in the enforcement of the ordinance.

Petitioners filed three separate complaints in the United States District Court for the Northern District of Texas, Dallas Division, challenging all aspects of the ordinance and seeking declaratory and injunctive relief. The three complaints were consolidated and the case was presented to the District Court on cross motions for summary judgment. The District Court found the ordinance constitutional except for four minor exceptions. Those provisions have since been deleted (See FW/PBS App. to Pet. for Writ of Cert., App. 103-111) and are not in issue here.

Petitioners appealed to the United States Court of Appeals, Fifth Circuit. The Court of Appeals upheld the constitutionality of the Dallas ordinance and rejected petitioners' challenge. Judge Thornberry concurred in part and dissented in part.

This Court on May 4, 1988, stayed the decision of the Court of Appeals except for its holding that the provisions of the ordinance regulating the location of sexually oriented businesses do not violate the Federal Constitution. On February 27, 1989, this Court granted petitioners' writs of certiorari limited to questions I, II and III in case No. 87-2012; questions 1 and 2 in case No. 87-2051; and both questions in case No. 88-49. All issues relating to the Dallas ordinance's locational restrictions were excluded from review.

#### 7

#### SUMMARY OF ARGUMENT

I. The questions accepted for review in this case involve the right of a city to temporarily deny or revoke a license to operate a sexually oriented business because a person seeking or holding a license has been recently convicted of at least one of thirteen sexually related crimes. The Dallas ordinance, which has as its primary enforcement tool a restriction on the location of sexually oriented businesses, was adopted after examination of studies conducted in other cities which documented that sexually oriented businesses have a deleterious effect on both existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values. In response to these studies and to a report demonstrating higher levels of crime, especially sexually related crime, associated with these businesses in Dallas, the City Council adopted the ordinance to address the crime problem as well as the other deleterious effects of sexually oriented businesses.

Petitioners argue that the license denial and revocation provisions of the ordinance impose a prior restraint on constitutionally protected speech and do not provide required procedural safeguards. The enforcement of this ordinance, however, does not carry with it any of the attributes of prior restraint that are condemned in Near v. Minnesota, 283 U.S. 697 (1931), National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977), or Vance v. Universal Amusement Co., 445 U.S. 308 (1980), the cases relied upon by petitioners for their assertion. No license is required for any speech, publication, or movie. The Dallas ordinance is not concerned with the content of materials or

services sold at a sexually oriented business; rather the purpose of the ordinance is to protect neighborhoods and reduce the crime associated with these businesses.

Since the ordinance regulates many types of sexually oriented businesses, including those which have no expressive activity associated with them, the assertion that businesses engaged in expressive activities are singled out for regulation and closure has no basis. Neither do the sexually related crimes used for disqualification single out expressive activity. Only three of the thirteen crimes are related to illegal expressive activity, i.e., obscenity; the sale, distribution, or display of material harmful to a minor; and possession of child pornography. See § 41A-5(a)(10), J.A. 18-19. It would be illogical for the city to exclude these sexually related crimes from the disqualifications simply because they involve unprotected speech. The use of obscenity as a predicate offense for government enforcement against sexually related businesses has been upheld in Fort Wayne Books, Inc. v. Indiana, 489 U.S. \_\_\_, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989). Conviction for obscenity as a temporary disqualification in the Dallas ordinance has less dire consequences upon the availability of expressive material than obscenity as a predicate offense in Fort Wayne Books. Under Indiana law, a RICO prosecution can result in forfeiture of materials, imprisonment, and a ban on conducting business.

Because those who operate sexually oriented businesses generally convey other peoples' messages, if one operator is forced to close because of criminal convictions, the amount of material available to the public will not be diminished. The demand for sexually oriented material and the likely competition for locations under the location restrictions of the ordinance, will result in a new purveyor taking his place and, more than likely, buying his stock-in-trade.

Petitioners argue that the license denial and revocation provisions of the ordinance are defective because they do not provide the procedural safeguards required by Freedman v. Maryland, 380 U.S. 51 (1965). These safeguards are required in cases involving a prior restraint on sale or publication. As previously argued, the Dallas ordinance does not have any of the attributes of prior restraint. Since the ordinance does not seek to suppress the content of any expressive material and nothing in the licensing scheme regulates the content of any expressive material, the Court of Appeals correctly held that "the Ordinance need only meet the standards applicable to time, place, and manner restrictions and need not comply with Freedman's more stringent limits on regulations aimed at content." FW/PBS, Inc. v. Dallas, 837 F.2d 1298, 1303 (5th Cir. 1988) (See also, FW/PBS App. to Pet. for Writ of Cert., App. 1-30).

II. The Dallas ordinance is valid under Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), as a content-neutral time, place, and manner regulation designed to serve a substantial government interest in protecting neighborhoods from the negative secondary effects of sexually oriented businesses while not unreasonably limiting alternative avenues of communication. If the license denial and revocation provisions are separated from the rest of the ordinance for analysis, the fact that they may not fit neatly into the time, place, and manner category should not deter the Court from analyzing them under the same standard since they meet the same criteria.

Application of the test established in *United States v. O'Brien*, 391 U.S. 367 (1968), to the license denial and revocation portion of the ordinance brings its validity into sharper focus. The substantial governmental interest in protecting neighborhoods surrounding sexually oriented businesses is unrelated to the suppression of free expression. The disqualification provisions are narrowly tailored to apply only to businesses which have been documented as causing adverse secondary effects, and only to the crimes which are most prevalent in and around these types of businesses. For these reasons, the license denial and revocation provisions of the ordinance are valid.

III. The adult motel petitioners are not regulated under the ordinance on the basis of any expressive activity but because they rent rooms for short periods of time. For this reason, the ordinance is valid as applied to them since it is rationally related to the city's legitimate interest in curbing prostitution and other sex-related crimes in the city's neighborhoods. Nevertheless, the studies relied upon by the city justify the regulation of any adult motels which do advertise the availability of sexually oriented movies or videos and are thus brought under the ordinance because of expressive activity. The rationale for including them in the regulations is the same as for adult motion picture theaters and adult arcades. The arguments of the motel petitioners do not substantiate any of their asserted constitutional claims, and the Court must uphold the adult motel provisions of the ordinance as valid.

#### **ARGUMENT**

I. THE LICENSE DENIAL AND REVOCATION PRO-VISIONS OF THE DALLAS SEXUALLY ORIENTED BUSINESS ORDINANCE DO NOT IMPOSE A PRIOR RESTRAINT ON THE DISSEMINATION OF CONSTITUTIONALLY PROTECTED EXPRESSION.

By refusing to accept for review any of the issues raised by petitioners concerning the location restrictions of the Dallas sexually oriented business ordinance, this Court has left standing the holdings from the lower courts regarding the validity of the underlying purpose and effect of the ordinance. The adult cabaret petitioners argue extensively that the licensing scheme as a whole in the Dallas ordinance is invalid. See Brief of Petitioners M.J.R., Inc., et al. at 9-21. This Court, however, accepted for review the narrow questions of whether the denial or revocation of a license on the basis of prior criminal convictions imposes a prior restraint or inevitably singles out persons engaged in First Amendment protected activity for regulation and closure.

- A. The temporary denial or revocation of a license to operate a sexually oriented business based on convictions for crimes that are demonstrated to proliferate in neighborhoods surrounding such businesses is in furtherance of the city's substantial governmental interests and does not impose a prior restraint.
  - Enforcement of the license denial and revocation provisions in the Dallas sexually oriented business ordinance does not resemble the enforcement activity in other cases where the Court has found a prior restraint.

Petitioners rely on Near v. Minnesota, 283 U.S. 697 (1931), and Vance v. Universal Amusements, 445 U.S. 308

(1980), for the proposition that the license denial and revocation provisions of the Dallas sexually oriented business ordinance impose a prior restraint upon expressive material. Their reliance is misplaced in both instances. Unlike the Dallas case, those two cases considered the use of state nuisance statutes to enjoin the future publication or dissemination of expressive material.

In Near, a publication was enjoined and thus made unavailable because of what its publisher had said on previous occasions. Under the Dallas ordinance, no publication is made unavailable because of the enforcement of the ordinance, nor need the number of sexually oriented businesses in the city be reduced. Rather, the ordinance attempts to curb identifiable persons who may reasonably be expected, because of their conduct in recent years, to promote, permit, or participate in the criminal conduct that sexually oriented businesses have been shown to foster.

The offender in Near had addressed serious political issues, albeit in a virulently anti-Semitic way. In the Dallas case, there is no claim that any political or religious discourse would be in any way restrained by the Dallas ordinance. The attempt in Near was to prevent the publisher from repeating his conduct in publishing scandalous material. The Dallas ordinance does not prevent anyone from repeating the crimes for which he has been convicted. Rather, the ordinance attempts to remove from certain licensed businesses persons whose recent criminal history strongly suggests that they will be inclined or easily tempted to engage in the criminal conduct to which sexually oriented businesses are particularly susceptible.

The prohibition placed on the offending person in Near was perpetual; the disability under the Dallas ordinance can be cured in a few years if the person avoids certain criminal conduct. In Near, the publication was the target of the enforcement without regard to the criminal record of the publisher. In the Dallas ordinance, the target is the methods of operating sexually oriented businesses that encourage crime.

Unlike the situation in Near, the materials and activities of sexually oriented businesses will continue to be widely available in Dallas even if the ordinance is vigorously enforced. Indeed, even a person who is disqualified under the ordinance could continue to distribute such materials wholesale or by mail order. If the defendant in Near could not publish his newspaper, however, his political viewpoint would not have been available to any significant degree in the community. The suppression of a publication or viewpoint is neither the intended nor the likely consequence of the Dallas ordinance. The ordinance does nothing to make sexually explicit materials any less generally available than they would otherwise be.

Vance involved state statutes authorizing injunctions to issue against the future exhibition of unnamed films that depict particular acts enumerated in the state's obscenity statute. These statutes resulted in the direct regulation of the content of motion pictures. This Court found that the statutes in Vance authorized prior restraints and were procedurally deficient. Like Near, Vance involved censorship of the future dissemination of expressive material, before the material was made available to the public.

The Dallas ordinance has no attributes of censorship. It does not call for the review of or prevent the publication or dissemination of any expressive material. It merely attempts to prevent, for a limited time, those persons convicted of certain crimes from engaging in a business that has a demonstrated relationship with those crimes. The ordinance is concerned only with the qualifications of those who may engage in a crime-sensitive business. It does not attempt to regulate the content of what is sold. Its purpose is not to suppress expressive material, but to reduce crime.2 In neither Near nor Vance was there a criminal conviction prior to enforcement. In fact, the purpose of the statute in each of those cases was to avoid the state's onerous burdens under the criminal law. Under the Dallas ordinance, a person does not lose a sexually oriented business license until he is actually convicted of certain crimes.

<sup>&</sup>lt;sup>2</sup> The Dallas City Council clearly stated its purpose and intent in passing the ordinance:

It is the purpose of this chapter to regulate sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. (J.A. 8-9).

Judge Thornberry's statement in his concurring and dissenting opinion below, that the "denial of a license to engage in speech is . . . the classic prior restraint . . . " [FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1307 (5th Cir. 1988)] is not appropriate to this case. The Dallas ordinance does not license people to engage in speech. It merely licenses people to operate sexually oriented businesses at particular locations. No license is required by this ordinance for any speech or publication, regardless of the sexually explicit content. An unlicensed person may write, create, publish, sell wholesale, sell through the mail, or give away sexually explicit material. In fact, an unlicensed person may operate a bookstore, so long as it does not have as one of its principal business purposes the sale of sexually explicit materials. Indeed, no license is required for most bookstores or video stores in the city.3 The underlying basis of Judge Thornberry's dissent seems to be his view that a license denial has the effect of totally banning speech. This view is mistaken. Since the grant of a license does not authorize one to engage in speech, its denial does not prevent one from engaging in speech. The concept of prior restraint is not relevant here. No speech is banned and no materials are censored.

Finally, the stringency of the rule against prior restraints rests in large part on the matter of who bears the burden of proof. There is a great difference between a publisher's having to persuade a censor that his yet-to-be-published manuscript is worthy of publication and a prosecutor's having to persuade a jury that an already published manuscript is so unworthy of publication as to be criminal. That there is no shift in the burden-of-proof, and in fact, a burden of proof question is in no way raised by the enforcement of the Dallas ordinance, are further indications that there is no genuine prior restraint consideration involved.

 The Dallas ordinance does not single out businesses engaged in expressive activities for regulation and closure.

Although it is proper to reasonably classify businesses involved in even expressive activity, the Dallas ordinance does not, as the adult cabaret petitioners argue, single out for regulation those businesses engaged in expressive activities. The ordinance regulates all sexually oriented businesses, including businesses that offer no expressive activities at all, such as escort agencies, sexual encounter centers, nude modeling studios, and certain

The assertion by the American Booksellers Association, et al., amici curiae brief in support of petitioners (Booksellers Br. 15-16) that virtually all bookstores or video stores will be subject to the ordinance is a mistaken interpretation of the requirements of the ordinance. Even petitioners do not make this claim. The ordinance definition of adult bookstore or adult video store is limited to commercial establishments which have as one of their principal business purposes the sale or rental of sexually explicit materials. See § 41A-2(2), J.A. 10. There are currently only 37 (Source: City of Dallas records) adult bookstores or adult video stores required to be licensed out of approximately 196 retail bookstores and 201 retail video stores in the city. Source: Greater Dallas Southwestern Bell Yellow Pages December 1988-89, pp. 344-48, 1860-61.

<sup>&</sup>lt;sup>4</sup> See George Anastaplo, The Constitutionalist: Notes on the First Amendment (Dallas: Southern Methodist University Press, 1971), p. 680 n. 18.

adult motels.<sup>5</sup> Neither do the disqualifications single out those engaged in expressive activities. Only three out of the thirteen disqualifying crimes involve any use of expressive materials and then only materials that are constitutionally unprotected.

Petitioners cite Arcara v. Cloud Books, Inc., 478 U.S. 647 (1986), as support for their "singling out" theory. But there, this Court upheld the closing of a bookstore by the enforcement of a public health regulation of general application. The Court applied no First Amendment scrutiny in Arcara because the sexual activity for which the bookstore was closed manifested "absolutely no element of protected expression." Id. at 705 (emphasis added). Likewise, under the Dallas ordinance, a license denial or revocation predicated on convictions for specified crimes involves absolutely no element of protected expression. Only three of the crimes are at all related to expressive activities (obscenity; the sale, distribution, or display of material harmful to a minor; and possession of child pornography), and the requirement of conviction for these crimes removes any question about the presence of an element of protected expression. By their nature as crimes, these offenses represent activity associated only with unprotected expression. It is clear that the Dallas ordinance does not single out persons or businesses engaged in First Amendment protected activities either for general regulation or for license denial or revocation.

 A city may properly rely on convictions for sexually related crimes that include an element of unprotected expressive activity, to temporarily disqualify a person from holding a sexually priented business license.

It is not unusual for regulatory authorities to include various kinds of criminal conduct as a disqualification for persons to hold licenses in regulated businesses. In fact, the City of Dallas makes such provisions in many of its ordinances. See § 6A-7(2) in Amusement Center ordinance, J.A. 54; and § 14-11(b)(6) in Dance Hall ordinance, J.A. 68, for two examples.<sup>6</sup> These eligibility requirements are generally for the safety of the patrons as well as the surrounding communities.

The bookselling and video petitioners mischaracterize the purpose of the license disqualification provisions of the ordinance as being the prevention of future speech crimes. This conclusion is based on the fact that three of the thirteen crimes that serve as disqualifications are crimes that involve expression, that is, obscenity; the sale, distribution, or display of harmful material to a minor; and possession of child pornography. The purpose of the ordinance, however, is to minimize sexually related crimes that have been documented to proliferate in areas

<sup>&</sup>lt;sup>5</sup> The Court majority in *Renton* was not disturbed by the fact that the ordinance then under review singled out only adult motion picture theaters for regulation. This fact was noted by the dissent. *Renton*, 475 U.S. at 57 (Brennan, J. dissenting).

<sup>6</sup> The sections of these ordinances cited here are correct.
Other portions of these ordinances as printed in the Joint Appendix do not include all current amendments.

surrounding sexually oriented businesses.7 The city has selected as one method of accomplishing this purpose, the disqualification of offenders who, because of their sex-related crimes, should not be trusted with the operation of sexually oriented businesses because those businesses are highly susceptible to criminal abuse. It would be contrary to the stated purpose of the ordinance and certainly illogical for the city to issue a sexually oriented business license to a person who had recently been convicted of crimes the ordinance seeks to control. A conviction for promotion of prostitution would clearly justify the denial or revocation of a sexually oriented business license. cf. Arcara, 478 U.S. 697 (1986). It is erroneous to argue that the First Amendment provides a shield to a person whose sexually related crime happens to be obscenity.

The Court has recognized this general principle in approving the use of obscenity convictions as a predicate offense for prosecution under the Indiana RICO statute in Fort Wayne Books v. Indiana, 489 U.S. \_\_\_\_, 109 S.Ct. 916, 103

L.Ed.2d 34 (1989). Since conviction under a RICO statute can result in the forfeiture of all assets used and acquired in the course of "racketeering" activity, this holding could have more dire consequences for the suppression of expressive materials than the temporary disqualification imposed by the Dallas ordinance. If there is "no constitutional bar to the State's inclusion of substantive obscenity violations among the predicate offenses under its RICO statute" (Id. 103 L.Ed.2d at 50), there can be no constitutional bar to the inclusion of a substantive obscenity conviction among the predicate crimes that serve as a temporary disqualification from holding a license to operate a sexually oriented business.

Petitioners point to the concurring opinion in Arcara as support for their argument that obscenity is an improper predicate offense for license denial or revocation. The concurring opinion warns that if "a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns." The Dallas ordinance, however, is not a pretext for closing down sexually oriented businesses. Quite the contrary, the ordinance acknowledges the legal status of such businesses by providing them a license to operate. Even so, the city is not arguing that the ordinance does not raise First Amendment concerns, only that these concerns are addressed under the proper standard of review.8 (See the discussion in Part II of this Brief.)

<sup>&</sup>lt;sup>7</sup> The City of Dallas considered studies conducted by the following cities, counties and organizations: Austin, Texas (DX 6); Indianapolis, Indiana (DX 7); Houston, Texas (DX 8); Beaumont, Texas (DX 9); Amarillo, Texas (DX 10); City of Los Angeles, California (DX 11); Phoenix, Arizona (DX 12); Las Vegas, Nevada (DX 13); Seattle, Washington (DX 14); Los Angeles County, California (summarized in DX 6); St. Paul, Minnesota (summarized in DX 6); and Vantex Enterprises, Inc., d/b/a Sheraton Mockingbird West (DX 21 and 22). The City of Dallas also conducted its own study (DX 19 and 20). These studies were consistent in their findings that higher crime rates and lower property values were directly related to sexually oriented businesses.

<sup>8</sup> The Court in Arcara made one point that deserves attention. Respondents in Arcara argued that the effect of the statu-(Continued on following page)

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tory closure impermissibly burdened its First Amendment-protected book selling activities. The Court observed that "the severity of this burden is dubious at best, and is mitigated by the fact that respondents remain free to sell the same materials at another location." Id. at 705. Although the Dallas license denial and revocation provisions would temporarily disqualify a person from operating a sexually oriented business at any location within the city, this burden is not sufficient to warrant strict scrutiny because the regulation only indirectly affects speech, and the only speech that is indirectly affected is considered to be of a lesser value. Young v. American Mini Theatres, Inc., 42" U.S. 50, 61 and 70 (1976); Renton, 475 U.S. at 49 n. 2.

The Brief of amicus curiae, PHE, Inc., in support of petitioners, asserts that such literary works as Ulysses and The Canterbury Tales will be affected by the Dallas ordinance. PHE Br. 12. This assertion is erroneous since § 41A-21(e) of the ordinance (See J.A. 37) provides an exception under both the licensing and location requirements for material that contains serious literary, artistic, political, or scientific value. It is clear that what sexually oriented businesses serve is not a creative literary and political culture, as described in the amici curiae brief of American Booksellers Association (Booksellers Br. 4), but rather the right of entrepreneurs to profit from the base gratification of others. The customers of sexually oriented businesses are hardly interested in Joyce or Chaucer. They are seeking sexual satisfaction (see, for example, DX 33). As aptly stated in the dissenting and concurring opinion of Justice Stevens in Fort Wayne Books, Inc. v. Indiana, 489 U.S. \_\_\_, 103 L.Ed. at 65 (1989), "Many sexually explicit materials are little more than noxious appendages to a sprawling media industry." While the right to sell this material is a constitutionally protected right, sexually explicit material has been recognized as a form of expression in which there is "a less vital interest in uninhibited exhibition . . . than in the free dissemination of ideas of social and political significance . . . . " American Mini Theatres, 427 U.S. at 61; Renton, 475 U.S. at 49 n. 2.

 The Dallas ordinance causes no ascertainable restriction on the public's access to constitutionally protected sexually oriented materials.

This Court has declined to hear petitioners' challenges to the location restrictions of the Dallas ordinance. Location restrictions would appear to have greater impact on the operation of sexually oriented businesses than licensing regulations, since many nonconforming businesses will have to move or change their operations at the end of the three-year amortization period. See § 41A-13(f), J.A. 27. Although a particular purveyor disqualified by a criminal conviction may be temporarily unable to sell sexually explicit materials or services at a sexually oriented business, the competition for locations will, without doubt, result in a new purveyor taking his place, as well as acquiring his stock-in-trade, and public access to sexually oriented materials and services will not be diminished.9

As discussed in the concurring opinion in American Mini Theatres, "the central First Amendment concern remains the need to maintain free access of the

<sup>&</sup>lt;sup>9</sup> In fact, Petitioner FW/PBS, Inc. argued in its brief to the Court of Appeals that between 106 and 114 currently operating sexually oriented businesses (not to mention new sexually oriented businesses entering the market) would be competing for no more than 50 locations under the Dallas ordinance. If Petitioner is to be believed, the competition for locations should be fierce. (See Opening Brief of Appellant FW/PBS, INC., et al., filed at the United States Court of Appeals for the Fifth Circuit No. 86-1723 pp. 43, 45-46, 51).

public to the expression." American Mini Theatres, 427 U.S. at 77. Because the owners of sexually oriented businesses convey primarily the messages of others [See Id. at 78 n. 2 (Powell, J. concurring)], it is of little consequence to the availability of the materials or services, which purveyor operates the commercial enterprise that sells them. It is important, however, to the suppression of crime. This regulation will have the effect not of suppressing protected expressive materials, but of assuring that the merchants who purvey such materials are persons who do not by their own acts contribute further to the deleterious secondary effects of sexually oriented businesses.

B. The procedural safeguards required in Freedman v. Maryland, 380 U.S. 51 (1965) are not applicable to the Dallas sexually oriented business ordinance.

The procedural safeguards prescribed in Freedman v. Maryland, 380 U.S. 51 (1965) were designed to deal with a licensing and censorship system which called for routine submission of all motion pictures to a censor before the films could be shown publicly. Upon a decision by the censorship board, a film could be found to be unprotected and thereby barred from exhibition until the exhibitor undertook a time-consuming appeal to the Maryland courts. Id. at 54. In Vance v. Universal Amusement Co., 445 U.S. 308 (1980), this Court found the Freedman safeguards applicable to an attempt to use the Texas public nuisance statute to enjoin the future exhibition of unnamed films that depicted particular acts enumerated in the state's obscenity statute. Similarly, in National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977), this

Court invalidated a state court order enjoining petitioners from marching with swastikas and distributing materials which promote hatred against the Jewish faith, because the process used in imposing the injunction lacked the procedural safeguards of Freedman.

In each of these cases the government was seeking to suppress the content of undesired expression. The Court found that if "a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, . . . " National Socialist Party, 432 U.S. at 44. The policy behind requiring such strict safeguards is that it "is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. . . . " Vance, 445 U.S. at 316. The Freedman test is designed to place the burden in these circumstances on government to expedite the determination of whether expressive material, which the government wishes to suppress, is constitutionally protected. The license denial and revocation provisions of the Dallas ordinance contain none of the elements of censorship found in these cases.

### 1. The Dallas ordinance contains no censorship of expressive materials.

The obvious as well as announced purpose of the Dallas ordinance is to control the secondary effects of sexually oriented businesses on surrounding neighborhoods. These effects have been demonstrated to include the proliferation of crime, urban blight, and plummeting

property values. The license denial and revocation provisions of the ordinance contain no censorship features. Nothing in the licensing scheme regulates the content of any expressive materials purveyed on the premise of a sexually oriented business.

There are no subjective judgments to be made here by governmental officials administering the denial and revocation procedure. The chief of police is required to issue a license unless he finds one or more of ten objective statements to be true. See § 41A-5, J.A. 17-20. Objective criteria are provided throughout the ordinance as the basis for action by any city official that would adversely affect the holding of a license. None of the possible adverse actions is based on the content, or any determination concerning the content, of the expressive materials purveyed on the premises of a sexually oriented business.

For these reasons the Court of Appeals correctly found that "the Ordinance need only meet the standards applicable to time, place, and manner restrictions and need not comply with Freedman's more stringent limits on regulations aimed at content." FW/PBS, Inc. v. City of Dallas, 837 F.2d at 1303. The Court of Appeals determined that the license denial and revocation provisions would, in fact, withstand strict scrutiny since the city established a "compelling justification for barring those prone to . . . [sexually related] crimes from the management of . . . [sexually oriented] businesses." Id. at 1305. It did not see fit to discuss the Freedman procedural safeguards because those safeguards do not apply to a regulation that does not at all attempt to restrict the contents of any expressive material, named or unnamed.

The licensing requirements of the Dallas ordinance are a valid means of ensuring enforcement of the location restrictions and are in furtherance of the city's purpose of reducing the deleterious effects of sexually oriented businesses on surrounding neighborhoods.

In American Mini Theatres, this Court upheld an ordinance containing licensing procedures which granted a broader discretion to administrative officials than does the Dallas ordinance. <sup>10</sup> In the present case, this Court declined to review the locational restrictions of the Dallas ordinance, thus leaving those regulations intact as affirmed by the Court of Appeals. FW/PBS, Inc. v. City of Dallas, 837 F.2d at 1306. The licensing requirements of the ordinance are an integral and useful part of the enforcement of the locational restrictions.

A business must be in compliance with the locational restrictions to receive a license. By requiring each sexually oriented business to obtain a license, the city can pinpoint the location of each business for the purposes of measuring distances required by the restrictions. The city will have accurate records for determining compliance and for providing information to applicants about available locations. Further, without this regulatory system,

or revoke an adult theater license at any time upon proof of "the violation . . . , within the preceding two years, of any criminal statute . . . or [zoning] ordinance . . . which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby." American Mini Theatres, 427 U.S. at 91 (Blackmun, J. dissenting).

prospective sexually oriented businesses would be left to guess where other sexually oriented businesses are located. The licensing also benefits a business by assuring that its location is so documented that other businesses cannot move within 1000 feet and claim prior rights.

All of the regulatory components of the Dallas ordinance are aimed at controlling crime, protecting neighborhoods, maintaining property values, and preventing the spread of urban blight. The district court correctly pointed out, as the petitioners conceded, that licensing is a valid method of ensuring that regulated businesses abide by locational and other restrictions. *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1071 n. 26 (N.D. Tex. 1986).

 The license denial and revocation provisions of the Dallas ordinance contain ample procedural safeguards for a noncensorship regulation that only incidentally affects speech.

While the procedural safeguards prescribed in Freedman are not applicable to the Dallas ordinance, the ordinance contains other procedural safeguards sufficient to protect the rights of applicants and license holders. It provides reasonable time periods within which the city must respond to applications and appeals. See § 41A-5, J.A. 17; and § 2-96(b), J.A. 39. The decisions of administrative officials must be based on objective criteria. An appeal to the permit and license appeal board from a suspension or revocation stays the action of the chief of police. See § 41A-11, J.A. 25. An appeal from the permit and license appeal board may be made to the state district court where a temporary restraining order may be

obtained to stay an order of the board pending a hearing on a temporary injunction or mandamus.

These procedures are more than adequate to protect the rights of persons engaged in an ongoing commercial enterprise, especially since the ordinance does not seek to regulate the content of any expressive material. Any effect that the ordinance's regulations may have on expressive material is incidental to the principal purpose of the ordinance to prevent the recognized secondary effects that sexually oriented businesses have on surrounding neighborhoods. For this reason the District Court was correct in its conclusion that Freedman is not applicable and that the "appeal, revocation, and suspension provisions are replete with procedural protections and reviewable standards . . . ." Dumas v. City of Dallas, 648 F.Supp. at 1075.

II. THE DALLAS ORDINANCE, WHICH AFFECTS EXPRESSION ONLY INCIDENTALLY AND ONLY IN FURTHERANCE OF SUBSTANTIAL GOVERNMENTAL INTERESTS WHOLLY UNRELATED TO THE REGULATION OF EXPRESSION, IS VALID UNDER RENTON V. PLAYTIME THEATRES, INC., 475 U.S. 41 (1986) AND UNITED STATES V. O'BRIEN, 391 U.S. 367 (1968).

Not only are the license denial and revocation provisions of the Dallas ordinance content-neutral regulations that only indirectly affect expressive activities, but the activities which they affect are "of a wholly different, and lesser, magnitude than the interest in untrammeled political debate. . . ." American Mini Theatres, 427 U.S. at 70, and

Renton, 475 U.S. at 49 n. 2.11 For these reasons, the Dallas ordinance merits the intermediate level of scrutiny offered by both Renton and United States v. O'Brien, 391 U.S 367 (1968). While the Renton test has often been applied to time, place, and manner regulations, the O'Brien test has been used in situations that did not necessarily fit the time, place, and manner description As this Court recently reiterated, however, the test under O'Brien "is little, if any, different from the standard applied to time, place, or manner restrictions." Texas v. Johnson, \_\_\_ U.S. \_\_\_, 57 U.S.L.W. 4770, 4772 (U.S. June 21, 1989); Ward v. Rock Against Racism, \_\_\_ U.S. \_\_\_, 57 U.S.L.W. 4879, 4884 (U.S. June 22, 1989). 12

The Court of Appeals in this case noted that the "Renton standard of review applies to the details of the licensing scheme . . . even though the licensing scheme may regulate aspects of the businesses' operations other than location." FW/PBS v. City of Dallas, 837 F.2d at 1304. It thus found the licensing requirements were designed "to control the negative effects of a certain kind of business rather than to suppress a certain type of speech" (Id. at 1302) and are, therefore, as valid as the location restrictions that these requirements serve. For this reason, the Court of Appeals held that the "'time, place or manner' analysis cannot be limited solely to regulation of 'place.' "Id. at 1304.

Under Renton, "content-neutral" time, place, and manner regulations are constitutional if they are "designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." Renton, 475 U.S. at 47. The only part of the licensing scheme the Court of Appeals in FW/PBS did not immediately recognize as a time, place and manner regulation were the provisions relating to license disqualifications for criminal convictions. The court reasoned, however, that

The courts have not engaged in . . . strict scrutiny and have not otherwise required compelling necessity to justify other occupational bars attending a criminal conviction including those laced with activity protected by the first amendment such as labor organizing. In short, the city need only show that conviction and the evil to be regulated bear a substantial relationship.

We agree with the district court that the Ordinance now is well tailored sufficiently to achieve its ends. FW/PBS, Inc. v. City of Dallas. 837 F.2d at 1305.

obscenity and other forms of speech will not diminish the vitality of the First Amendment. In his article "How to Read the Constitution of the United States," Loyola University of Chicago Law Journal, Fall 1985, George Anastaple observes:

After recognizing that political speech is at the heart of the "freedom of speech" clause, it is salutary to remind ourselves that our extensive freedom of political discussion did develop independent of the licentiousness to which we have recently become accustomed. Thus, neither principle nor history dictates that we must put up with licentiousness in order to have political freedom and effective self-government. Ibid., 54.

See also, G. Anastaplo, The Constitution of 1787: A Commentary (Johns Hopkins University Press, 1989) at 321 n. 98.

<sup>12</sup> This Court also explained in Ward v. Rock Against Racism that the "least restrictive" analysis sometimes attributed to O'Brien no longer applies to content-neutral regulations that only indirectly affect expressive activities.

Because of the direct and substantial relationship between the offense and the evil to be regulated and because of the fact that the denial or revocation is temporary, the Court of Appeals determined that the disqualification provisions should not be analyzed under a standard different from that applicable to the ordinance as a whole.

#### Content neutrality

It is settled that an ordinance may be considered a "content-neutral" regulation for purposes of analysis under Renton, even though it classifies businesses based on content, if its measures are aimed not at the content but rather at the secondary effects of the business on the surrounding community. Renton, 475 U.S. at 47-48. A regulation is content-neutral if it is justified without reference to the content of the regulated speech, Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976). The license denial and revocation provisions of the Dallas ordinance are content-neutral because they are aimed at the secondary effects of sexually oriented businesses and not at the content of what is sold on the premises of the businesses, and the provisions are justified without reference to the content of the materials. Even the dissenting opinion in the Court of Appeals recognized that the Dallas ordinance is content-neutral. FW/PBS v. City of Dallas, 837 F.2d at 1308 (Thornberry, J. concurring in part and dissenting in part).

#### Governmental interests served

The Dallas ordinance is designed to serve the same vital governmental interests that were at stake in both

Renton and American Mini Theatres. A city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. American Mini Theatres, 427 U.S. at 71; Renton, 475 U.S. at 50.

#### Alternative avenues of communication

The Dallas ordinance as a whole has been held to provide reasonable alternative avenues of communication for sexually oriented businesses. Dumas v. City of Dallas, 648 F.Supp. at 1069-71; FW, PBS v. City of Dallas, 837 F.2d at 1303. Individuals who are temporarily denied licenses also have limitless alternative avenues of communication. They may write, create, publish, sell wholesale, sell through the mail, or give away sexually explicit material. They may even operate a bookstore so long as it does not have as one of its principal business purposes, the sale of sexually explicit materials. The only limitation on individuals convicted of certain crimes is that temporarily they cannot operate a specific type of commercial establishment.

This Court should thus uphold the Dallas ordinance as a "content-neutral" time, place, and manner regulation designed to serve a substantial governmental interest which does not unreasonably limit alternative avenues of communication. If the Court determines, however, that the license denial and revocation provisions should be separated for analysis, the fact that they do not fit neatly into the time, place, and manner category should not deter the court from analyzing them under the same standard of review. In all respects, they meet the same criteria as the other provisions of the ordinance. This becomes very clear when the O'Brien test is applied.

#### The O'Brien test

Under O'Brien, a regulation is justified despite its apparent impact on First Amendment interests (1) "if it is within the constitutional power of the government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest." O'Brien, at 377.

First, the City of Dallas, unquestionably, has the constitutional authority to enact licensing ordinances of this type. American Mini Theatres, 427 U.S. 50; see also, Cox v. New Hampshire, 312 U.S. 569 (1941). Second, as already noted, the license denial and revocation provisions of the Dallas ordinance clearly further important and substantial governmental interests of crime control. Third, the legislative history of the ordinance demonstrates that the governmental interest promoted by the ordinance is unrelated to the suppression of free expression. Dumas v. City of Dallas, 648 F.Supp. at 1069; see also, Id. at 1064-65 nn. 8-10, 1069 n. 21.

Finally, any incidental restriction that the ordinance may place on an individual's First Amendment freedom is no greater than is essential for the furtherance of the city's important and substantial governmental interest. Dumas v. City of Dallas, 648 F.Supp. at 1069. This fourth prong of O'Brien must be approached with awareness of the admonitions of Renton and United States v. Albertini, 472 U.S. 675 (1985). This Court in Renton observed that cities "must be allowed a reasonable opportunity to

experiment with solutions to admittedly serious problems" and was careful not to second-guess the wisdom of
the particular method chosen. Renton, 475 U.S. at 52. In
Albertini, the Court insisted that time, place, or manner
regulations are not invalid simply because there is some
imaginable alternative that might be less burdensome on
speech. Albertini, 472 U.S. at 689. While one might devise
an alternative that is less restrictive than the license
denial and revocation provisions of the Dallas ordinance,
this court made its position on this subject very clear in
Ward v. Rock Against Racism, \_\_U.S.\_\_, 47 U.S.L.W. 4879
(U.S. June 20, 1989):

Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-intrusive means of doing so. *Id.* at 4884.

The license disqualification provisions are narrowly tailored to apply only to businesses which have been documented as routinely causing adverse secondary effects and only to the crimes which are most prevalent in and around these types of businesses. 13 As the District Court pointed out:

This principle was squarely addressed in Arcara v. Cloud Books, Inc., \_\_U.S\_\_, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986)(Burger, C.J.), in which the Court held that a sexually related business could be closed when management was aware of sexual behavior on

<sup>13</sup> The District Court ruled that five enumerated crimes were not sufficiently related to the purpose of the ordinance. Dumas v. City of Dallas, 648 F.Supp. at 1074. The City Council subsequently amended the ordinance to remove those crimes.

the premises, in violation of law. If violation of law by a licensee may permissibly justify closure, it follows inescapably that one who has been convicted of a sex-related crime may be denied licensure. . . . One intent of the law was to prevent crime; the Ordinance considers only certain crimes to be relevant – such as prostitution, obscenity, or child pornography . . . . It allows even those convicted of such offenses to be licensed after a certain amount of time has elapsed. . . . It is thus narrowly tailored to avoid licensure of those who have recently shown a predilection toward the criminal conduct the Ordinance was designed to overcome. Dumas v. City of Dallas, at n. 34.

The licensing provisions of the Dallas ordinance satisfy the fourth element of the O'Brien test as elaborated by Albertini, in that they promote a substantial governmental interest that would be achieved less effectively in the absence of the regulation.

The O'Brien test was formulated and applied in a case upholding a regulation which indirectly affected highly protected political speech. Thus, the test's application to a regulation that indirectly affects expression of a much lesser value should require little debate. It is apparent that the license senial and revocation provisions of the Dallas orderance are valid under the O'Brien test.

III. THE DALLAS ORDINANCE'S ADULT MOTEL REGULATIONS DO NOT VIOLATE THE FIRST, FOURTH, FIFTH, OR FOURTEENTH AMENDMENTS OR ANY CONSTITUTIONALLY PROTECTED FREEDOMS OF ASSOCIATION.

This Court accepted review of the adult motel regulations in the Dallas ordinance to determine whether those regulations violate the First, Fourth, Fifth, or Fourteenth Amendments to the Constitution or any constitutionally protected freedom of association. Since the motel petitioners failed to argue a single Fifth or Fourteenth Amendment violation in their brief, those two issues must be settled in favor of the city. By petitioners' own admission, they have not challenged the Dallas ordinance on Fifth Amendment grounds. See Brief of Petitioners Calvin Berry, III, et al. at 4 (hereinafter Berry's Br.). The only issues which remain are the challenges under the First and Fourth Amendments and the challenge regarding associational freedoms.

The motel petitioners have asserted two issues not raised before. These include rights of commercial free speech (Id. at 14-15) and "the right to be let alone" (Id. at 13-14), neither of which have been previously argued in this case. Ordinarily, this Court does not decide questions not raised or resolved in the lower court except in exceptional circumstances. Youakim v. Miller, 425 U.S. 231, 234 (1976); citing California v. Taylor, 353 U.S. 553, 557 n. 2 (1957); Lawn v. United States, 355 U.S. 339, 362-63 n. 16 (1958). There has been no attempt to show exceptional circumstances in this case; therefore, the Court should limit its review to issues that were considered below. 14

<sup>&</sup>lt;sup>14</sup> In any case, petitioners do not explain the commercial free speech issue sufficiently to permit rebuttal. Their assertions regarding the "right to be let alone" seem to be similar to their privacy assertions. Indeed, their argument seems to be that they have a "right" not to be regulated in any way by the city.

The motel petitioners attack the Dallas City Council's findings as not specific enough (Berry's Br. 9-10); not supported by evidence (Id. at 12); and not "findings' at all, but purely speculative conclusions." Id. at 12. These attacks have no merit. The Court need only consider the studies and evidence contained in the record, (DX 1-2, 5-15, 17-18, 20 and 22); the unanimous findings of the City Plan Commission and the City Council (DX 16); the findings of the trial court (Dumas v. City of Dallas, 648 F.Supp. at 1076); and the conclusions of the Court of Appeals (FW/PBS v. City of Dallas, 837 F.2d at 1304-05), to realize that these attacks on the legislative findings have no basis.

Petitioners' First Amendment challenge is based on their assertion that the motel rooms they rent to the public have public access television transmissions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas." Berry's Br. 13. The ordinance definition creates three categories of activities that will bring a motel under the regulations for adult motels: (A) the offering and advertising, by way of a sign visible from the public right-ofway, of sexually explicit photographic reproductions available through television; (B) the offering of a sleeping room for rent for a period of time less than 10 hours; or (C) allowing the occupant of a sleeping room to subrent the room for a period of time less than 10 hours. See § 41A-2(4), J.A. 10.

By their own admission (Berry's Br. 4), petitioners' motels do not have a sign visible from the public right-of-way which advertises the availability of photographic

reproductions; therefore, they are not subject to the ordinance under Paragraph (A) of the definition and consequently are not being regulated on the basis of any First Amendment activity. In fact, there is nothing in the record of this case (other than the assertion in petitioners' brief) to verify that the motel rooms belonging to petitioners are equipped with television sets at all. The regulation of petitioners' adult motels is based solely upon the time period for which they rent rooms. Indeed, the Court of Appeals found, it "is certainly within reason that short rental periods facilitate prostitution . . ." (FW/PBS v. City of Dallas, 837 F.2d at 1304), and this type of criminal activity is what the ordinance seeks to suppress.

Having admitted that they are not regulated on the basis of any expressive activity, the petitioners' argument concerning lack of studies is irrelevant since extensive studies are not necessary to justify a business regulation that does not implicate the First Amendment. If, however, petitioners' motels had advertised in a way to subject themselves to the ordinance based on paragraph (A) of the definition, the city's substantial governmental interest in regulating adult motion picture theatres and adult arcades would have justified regulation of petitioners' adult motels. Both the theater and arcade uses have the same characteristics as motels that advertise sexually explicit videos or movies [See definitions in § 41A-2(1) and (5), J.A. 9-11]. The studies regarding those uses and adult motel uses (DX 6-14 and 19-22) substantiate the need for regulation.

One of Petitioners' Fourth Amendment challenges is based on their characterization of a motel room as a "temporary home." Berry's Br. 15. The assertion that a "temporary home" is without merit. Renting a motel room for two hours is more clearly associated with prostitution (FW/PBS v. City of Dallas, 837 F.2d at 1304), than with "the creation and sustenance of a family." Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984). This viewpoint is substantiated by the revealing statement in the motel petitioners' own brief that the "well-recognized 'quickie', the 'nooner', the 'one night stand' are traditional in America. . . . " Berry's Br. 19.

Petitioners mention the right to privacy many times in their brief. They do not explain, however, exactly how they believe anyone's right to privacy is being violated. To some extent their argument seems to be based upon their view of a motel room as a temporary home, but they also refer to the right to privacy of motel owners. Berry's Br. 14. In any case, no right to privacy issues are implicated in the Dallas ordinance.

Petitioners also attempt to find a Fourth Amendment issue by a cursory mention of the inspection section of the ordinance. Berry's Br. 19. The purpose, intent, and application of that section is to insure compliance with fire, safety, and other regulations, none of which apply to the activities of patrons who are renting rooms. The provision authorizes inspections when a business is occupied or open for business and was intended to limit the times at which businesses could be inspected. Furthermore, § 41A-7(c) specifically provides that the inspection provisions do not apply to rented motel rooms. In any case, under "the administrative search doctrine, searches to enforce regulatory standards may be reasonable in light of the reduced expectation of privacy in a pervasively

regulated business." FW/PBS v. City of Dallas, 837 F.2d at 1306, citing United States v. Biswell, 406 U.S. 311 (1972) and Marshall v. Barlow's Inc., 436 U.S. 307 (1978). The Court of Appeals held that "sexually oriented businesses face a degree of regulation that renders the inspection provision presumptively reasonable." FW/PBS v. City of Dallas, 837 F.2d at 1306.

Finally, the Dallas ordinance does not violate motel owners' and operators' rights of intimate or expressive association. Motel owners and operators do not share with patrons a special community of thoughts, experiences, beliefs, nor the distinctively personal aspects of their lives. Motel patrons are numerous and motel owners are not highly selective in their decisions to rent rooms to them. See *Roberts*, 468 U.S. at 620. Renting rooms to the public is not an activity protected as an intimate association.

In a further attempt to establish an issue of expressive association, the motel petitioners again rely on their assertion that the motel rooms contain television sets. Putting a television in a motel room does not make the renting of that room an expressive act protected by the Constitution. Petitioners also assert that the associational activities of their patrons are protected by the First Amendment. That may be so, but nothing in the Dallas ordinance regulates the activities of the patrons of motels. It does not affect how long they may stay nor what they may do while they are there. No issue of expressive or intimate association is raised by this case.

The arguments of the motel petitioners do not substantiate any of their asserted constitutional claims. For this reason, the Court must uphold the adult motel provisions of the ordinance as valid regulations to protect the public health, safety, morals, and general welfare. The regulations are clearly not arbitrary nor unreasonable, but are rationally related to the city's legitimate interest in curbing prostitution and other sex-related crimes. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Vance v. Bradley, 440 U.S. 93, 97 (1979); Shelton v. City of College Station, 780 F.2d 475, 479 (5th Cir. 1986)(en banc), cert. denied, 477 U.S. 905 (1986) and 479 U.S. 822 (1986).

#### CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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# REPLY BRIEF



No. 87-2012

Supreme Court, U.S. FILED

AUG 18 1989

JOSEPH F. SPANIOL, JR.

In The

#### Supreme Court of the United States

October Term, 1988

FW/PBS, INC., ET AL.,

Petitioners,

VS.

THE CITY OF DALLAS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONERS FW/PBS, ET AL.

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I. THE CHALLENGED DALLAS LICENSING ORDINANCE IMPOSES AN UNCONSTITUTIONAL
PRIOR RESTRAINT OF EXPRESSION BY
AUTHORIZING SUPPRESSION OF SPEECH IN
ADVANCE OF ITS EXPRESSION WITHOUT THE
PROCEDURAL SAFEGUARDS REQUIRED BY
FREEDMAN V. MARYLAND

Respondent, City of Dallas, asserts that the challenged ordinance does not create a prior restraint of expression such as those condemned in Near v. Minnesota, ex rel. Olson, 285 U.S. 697 (1931), National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977) or Vance v. Universal Amusement Co., 445 U.S. 308 (1980). The City apparently contends that since the ordinance is directed toward the secondary effects of sexually oriented businesses and does not require review of expressive material it does not constitute a prior restraint.

This position is contrary to the consistent decisions of this Court which stress that regulations restricting expression must be examined in the context of their operation and effect. Near v. Minnesota, supra, 283 U.S. 697, 708. See Petitioner's FW/PBS Brief, p. 19, Petitioner MJR's Brief, p. 24. During its most recent term, this Court reaffirmed this principle in Fort Wayne Books, Inc. v. Indiana, \_\_US\_\_\_, 103 L.Ed.2d 34, 53-54 (1989) stating, "As far back as Near v. Minnesota, ex rel. Olson, [supra] this Court has recognized that the way in which a restraint on speech is "characterized" under State law is of little consequence . . . [T]he State cannot escape the constitutional safeguards of our prior cases by merely re-categorizing . . obscenity violations as racketeering." Likewise, the City's talismanic invocation of secondary effects

cannot support the licensing regulation that effectively bans speech before its utterance.

The Dallas ordinance does not require the review of particular material prior to dissemination because it imposes a blanket prohibition on the dissemination of presumptively protected sexually explicit material on the basis of a single criminal conviction. As stated by the District Court, "denial of a license amounts to an absolute suppression of expression." Dumas v. City of Dallas, 648 F.Supp. 1061, 1074 n. 37. Contrary to the assertion of the City, the restraint on expression imposed under the licensing scheme is far broader than those struck down in Near and Vance.

In the most recent term, this Court has reaffirmed the distinction between valid narrow regulation of expression and those regulations that impose an impermissible prior restraint. In Ward v. Rock Against Racism, \_\_U.S.\_\_\_, 105 L.Ed.2d 661, 109 S.Ct. \_\_\_ (1989), a New York regulation requiring musicians to use sound equipment and sound technicians provided by the city was upheld against First Amendment challenge. The Court distinguished the regulation from an invalid prior restraint:

As we said in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), the regulations we have found invalid as prior restraints have 'had this in common: they gave public officials the power to deny use of a forum in advance of actual expression.' Id. at 553. The sound-amplification guideline, by contrast, grants no authority to forbid speech, but merely permits the city to regulate volume to the extent necessary to avoid excessive noise. . . . The relevant question is whether the challenged regulation authorizes

suppression of speech in advance of its expression, and the sound-amplification guidelines does not. Ward v. Rock Against Racism, supra, 105 L.Ed.2d at 678, n. 5. (Emphasis in original)

What distinguishes the sound regulation upheld in Ward from the Dallas licensing scheme is that the Dallas ordinance authorizes the complete ban of a broad spectrum of protected speech. Unlike the regulation in Ward which narrowly focused on the sound mix of music, the Dallas ordinance completely prohibits the operation of entire businesses that distribute protected speech material for periods of up to five years.

Respondent City of Dallas asserts that the challenged ordinance "does not license people to engage in speech" but rather "merely licenses people to operate sexually oriented businesses at particular locations." Respondent's Brief, p. 14. The City stresses that the ordinance only regulates the operations of certain businesses engaged in the distribution of speech materials and does not seek to censor any speech materials. As a result, the City contends that the licensing scheme only "indirectly affects speech." Respondent's Brief, p. 20.

However, recent decisions of this Court unequivocally reject any suggestion that regulation of the commercial distribution of speech materials are subject to a lesser standard of review. In Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. \_\_\_\_, 101 L.Ed.2d 669, 108 S.Ct. 2667 (1988), a statute requiring professional fundraisers to obtain a license prior to engaging in charitable solicitation was determined to violate the First Anatometer. The Court rejected the state's argument that the statute was simply "an economic regulation with no First Amendment implication." Id., 101 L.Ed.2d at 685. The Court went on the reaffirm the principle that "[i]t is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." Id. at 692.

Likewise, in City of Lakewood v. Plain Dealer Publishing Co., 486 U.S \_\_\_, 100 L.Ed.2d 771, 108 S.Ct. 1238 (1988), the entire Court agreed that a law licensing businesses engaged in the distribution of speech materials would be subject to First Amendment scrutiny under Lovell v. Griffin, 303 U.S. 444, 8 L.Ed. 949, 58 S.Ct. 666 (1937) and Freedman v. Maryland, 380 U.S. 51 (1965). While the dissent differed from the majority on the existence of a First Amendment right to place a newsrack on public property, Justice White expressly stated in the dissent that "the Lovell-Freedman line of cases would be applicable here if the City of Lakewood sought to license the distribution of all newspapers in the City, or if it required licenses for all stores which sold newspapers." Id., at 796.

In the instant case, the City of Dallas requires licenses for any sexually oriented business within the City of Dallas. Denial or revocation of such a license will result in "the classic prior restraint" of protected expression. FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1307 (5th Cir. 1988) (J.Thornberry dissenting). Pursuant to the foregoing cases, there should be no question that the Dallas licensing scheme authorizes the suppression of protected expression, resulting in an impermissible prior restraint that must be analyzed pursuant to Lovell-Freedman line of cases.

The City goes on to imply that the strong presumption against prior restraints should be relaxed in the instant case because the government bears the burden of proof in the criminal cases that may form the basis for the revocation of a license under the ordinance. Respondent's Brief, p. 15. This position contradicts the repeated statements of this Court that "the burden of supporting an injunction against future expression is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication." Vance v. Universal Amusements, supra, 445 U.S. 308, 315-316. See also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-559 (1975). The complete suppression of future expression for one past act of a person or their spouse is the essence of prior restraint of expression. Contrary to the City's arguments, the challenged licensing scheme creates a classic system of prior restraint that previously has been rejected by this Court on numerous occasions and which should be rejected in this case.

II. THE DALLAS LICENSING ORDINANCE CREATES AN UNCONSTITUTIONAL PRIOR RESTRAINT AND MUST BE ANALYZED UNDER THE STRICT SCRUTINY ANALYSIS OF THE LOVELL-FREEDMAN LINE OF CASES

Respondent City of Dallas admits the challenged ordinance raises First Amendment concerns and, as such, contends that the proper analysis should be that of a time, place and manner regulation of speech. Respondent's Brief, pp. 19, 28.1 However, the challenged

<sup>&</sup>lt;sup>1</sup> This position differs significantly from that of Amici U.S. Conference of Mayors, et al. which assert that the ordinance (Continued on following page)

licensing ordinance is properly analyzed under the strictest level of scrutiny since it imposes the onerous burden of periodic licensing upon one particular form of expression. See City of Lakewood v. Plain Dealer, supra, 100 L.Ed.2d 771; Riley v. National Federation of the Blind, supra, 101 L.Ed.2d at 692. Strict scrutiny of the ordinance under the First Amendment is justified not only by the fact the ordinance imposes an annual licensing requirement as in City of Lakewood, but also by the fact that the license is focused upon a content based classification of speech, namely, protected sexually explicit expression. The necessity of such strict scrutiny to protect First Amendment rights is especially apparent where the particular speech burdened is disfavored by the government. As the trial court specifically found, "the public speakers in favor of the ordinance supported it almost singularly in hopes that it would indeed suppress the speech purveyed by sexually oriented businesses . . . " Dumas v. City of Dallas, supra, 648 F.Supp. at 1065. See also, Arcara v. Cloud Books, Inc., 478 U.S. 697, 711-712 (1986) (Blackmun, J., dissenting).

(Continued from previous page)

authorizing denial of a license to engage in protected speech in this case should be examined as an economic regulation under the Equal Protection Clause of the Fourteenth Amendment. According to these Amici, the Dallas licensing ordinance should be upheld if it has some reasonable basis and if it bears a rational relationship to the City's objective. Brief of Amici Curiae, p. 22. As discussed upra, this extreme position was again rejected recently in k.ley. There can be no question that the challenged licensing ordinance burdens expression and must be considered accordingly. Indeed, Respondent City and every court below has recognized that First Amendment concerns are implicated in this case.

As previously discussed in Petitioners' Briefs, the challenged ordinance lacks virtually every procedural safeguard required by Freedman v. Maryland, supra, 380 U.S. 51. The City's response is that such procedures are not necessary since "the ordinance does not seek to regulate the content of any expressive material." Respondent's Brief, p. 27. This response ignores the fact that the restraint imposed by denial or revocation of a license is more severe than those imposed in Freedman or Vance because it prohibits the dissemination of a broad class of protected expression rather than a single work or unprotected obscene materials.

#### III. THE DALLAS ORDINANCE IS UNCONSTITU-TIONAL UNDER ALL ELEMENTS OF THE TIME, PLACE OR MANSIER ANALYSIS

Respondent City asserts that the ordinance is properly analyzed as a time, place or manner regulation with only an incidental impact on expression. Assuming, but certainly not conceding, that the challenged ordinance is properly analyzed as a time, place or manner regulation of protected speech, it is clear that it fails to fulfill the requirements for such a regulation.

It is well settled that "the government may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are 'justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of information." Ward v. Rock Against Racism, \_\_U.S.\_\_, 105 L.Ed.2d 661,

675 (1989) quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

#### A. The Dallas Licensing Ordinance Is Not Content-Neutral

The City asserts that the licensing denial and revocation provisions of the ordinance "are content-neutral because they are aimed at the secondary effects of sexually orient businesses and not at the content of what is sold on the premises of the businesses, and the provisions are justified without reference to the content of the material." Respondent's Brief, p. 30. More specifically, "the ordinance attempts to remove from certain licensed businesses persons whose recent criminal history strongly suggests that they will be inclined or easily tempted to engage in the criminal conduct to which sexually oriented businesses are particularly susceptible." Id., p. 11. The criminal offenses of obscenity and display of materials harmful to minors can form the basis for denial or revocation of a license. D.M.C. Section 41A-5(a)(10)(A)(ee), (ff).

Thus, the licensing regulation is justified by the City's interest in controlling crime which includes obscenity and exposure of materials harmful to minors. The justification of controlling crime includes crimes involving unprotected speech. As such, the justification of controlling, inter alia, unprotected speech necessarily includes reference to the content of the material that is being regulated. In Boos v. Barry, 485 U.S. \_\_\_, 99 L.Ed.2d 333, 108 S.Ct. \_\_\_ (1988), the Court determined that regulation of speech "due to its potential primary impact,

provided the following example of such a regulation:

Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are not the type of 'secondary effects' we referred to in [City of] Renton [v. Playtime Theaters, Inc., 475 U.S. 41 (1986)]. To take an example factually close to Renton, if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech. Id.

Likewise, the Dallas ordinance regulates the direct impact of a particular category of speech. An increase in crime is not a secondary effect of obscenity or exposure of materials harmful to minors, but rather a direct result of these types of expression because these types of unprotected speech constitute crimes themselves. As such, these particular regulations of speech cannot be considered content-neutral time, place or manner restrictions but rather content-based regulations. As discussed previously, a broad prohibition on the future expression of both protected or unprotected speech cannot be justified on the basis of previous unprotected expression. See Vance v. Universal Amusements, supra, 445 U.S. 308; Near v. Minnesota, supra, 285 U.S. 697. It therefore follows that a broad prohibition on the future expression of protected speech cannot be justified on the basis that some of that speech may be deemed to constitute a crime. Since the challenged licensing provisions regulate speech due to its

potential primary impact, it must be considered contentbased.

B. The Dallas Licensing Ordinance Is Not Narrowly Tailored To Advance A Significant Governmental Interest.

In order to be a valid time, place or manner regulation, the Dallas ordinance must be narrowly tailored to advance the City's interest in controlling crime. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." Frisby v. Schultz, 487 U.S. \_\_\_\_, 101 L.Ed.2d 420, 432, 108 S.Ct. \_\_\_ (1988). While the ordinance need not be the least restrictive means of regulation, "this standard does not mean that a time, place or manner regulation may burden substantially more speech than necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Ward v. Rock Against Racism, supra, 105 L.Ed.2d 661 at 681.

The foregoing discussion of content neutrality illustrates that the challenged ordinance is far broader than necessary to accomplish the City's goal of reducing crime. Under the ordinance, a license to present protected expression will be denied if a person or their spouse is convicted of one of the enumerated crimes. The ordinance imposes a ban on future expression for several years on a sexually oriented business that has a license denied or revoked. As a result, the licensing requirement burdens a large amount of protected expression in order

to achieve the City's goal of reducing crime which can be achieved by far narrower means. For example, criminal conduct can be prosecuted if it occurs. Moreover, if criminal conduct occurs on the premises of a sexually oriented business, the nuisance remedy set forth in Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986) can be employed without an absolute restraint of protected speech at all locations within the City of Dallas. In addition, the zoning provisions of the Ordinance already minimized any adverse secondary effects of the regulated businesses.

The licensing provisions do not focus on the evil sought to be remedied but rather impose a blanket restraint on expression. This restraint suppresses a great quantity of protected speech that has nothing to do with crime. As such, the future restraint on expression imposed by the denial or revocation of a license is substantially broader than necessary to achieve the reduction of crime.

C. The Dallas Licensing Ordinance Does Not Provide Any Alternative Avenues of Communication.

The final element of the analysis of time, place or manner regulations requires that the regulation leave open ample alternative avenues of communication. The denial or revocation of a license to operate a business disseminating sexually explicit expression will not only result in the closure of one particular business establishment, but will prohibit the operation of such a business at any location within the City of Dallas for a term of years.

The challenged licensing requirement differs from a zoning regulation since "a person who is prevented from speaking at one location because of a zoning restriction can move to the alternative location that must exist. A person barred from speaking because of his criminal history has no such option." FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1312 (5th Cir. 1988) (Thornberry, J., dissenting) (emphasis added). The challenged licensing scheme does not allow any further operation of a business to one denied a license.

"The First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be an opportunity to win their attention." Heffron v. International Society of Krishna Consciousness, 452 U.S. 640, 655 (1981) quoting Kovacs v. Cooper, 336 U.S. 77, 87 (1949). Moreover, "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147, 163 (1939) quoted in Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76-77 (1981).

In the instant case, the City of Dallas through a scheme of licensing expression prior to its utterance, prohibits the expression of protected speech of persons who comply with all zoning regulations. As such, the licensing ordinance denies all opportunity to win the attention of willing listeners by restraining one category of protected speech. This ban on a single aspect of speech denies any alternative avenue of expression to a significant class of persons. Therefore, the Dallas sexually oriented business licensing ordinance fails to fulfill this, or any other of the requirements of a valid time, place or manner regulation of expression.

#### CONCLUSION

Based upon the foregoing arguments and authorities, Petitioners respectfully request this Honorable Court to reverse the judgment of the United States Court of Appeals for the Fifth Circuit and declare Dallas Municipal Code 41A unconstitutional in its entirety and award attorneys fees, costs, and such other relief this Court deems appropriate.

Dated: August 18, 1989

Respectfully submitted,
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# AMICUS CURIAE

# BRIEF

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE CITY OF DALLAS, ET AL., RESPONDENTS, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Citizens for Decency through Law, Inc. ("CDL"), Moving Party herein, respectfully moves this Honorable Court for an order granting leave to file the actached Brief Amicus Curiae. CDL was an amicus in the Court of Appeals below and filed the attached Brief in that case. CDL also responded to the request of the Clerk of this Court to file, as amicus, a Response to Petitioners' Application for Recall and Stay of Mandate on April 22, 1988, before Justice White in this case, docket No. A-800.

The attached Brief supports the position of Respondents in opposing the Petition for a Writ of Certiorari in this case. The City of Dallas is also opposing the Petitions in two related

cases, MJR, Inc. et al. v. City of Dallas, et al, No. 87-2051, and Calvin Berry, et al. v. City of Dallas, et al., No. 88-49, and the arguments presented herein also apply to those Petitions in that the District Court should have abstained from ruling in this federal challenge to the Dallas "adult use" zoning ordinance enforcement and should not have issued any injunction under 18 U.S.C. §1983 even if a declaratory injunction was issed under 42 U.S.C. \$2201. These issues also warrant denial of review by certiorari in addition to the arguments proposed in opposition to the Petitions as put forth by The City of Dallas, et al., Respondents herein.

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# INTEREST OF CDL AS AMICUS CURIAE

Citizens for Decency through Law, Inc. (CDL) was founded in 1957 by Charles H Keating, Jr. to provide a

means for lawyers to assist prosecutors and police in enforcing and defending obscenity laws, to assist public officials improve and adopt constitutional statutes and ordinances, and to assist local citizens and community leaders understand the role of the law and legal system in dealing with the social issue of pornography and sexual exploitation. CDL has a staff of former prosecuting attorneys with experience in obscenity cases which is available for this purpose. Mr. Keating and CDL have filed over fifty briefs on the merits and as amicus in the U.S. Supreme Court and have participated in trials and appeals in many states on the side of government and law enforcement officials. CDL has also affiliated chapters, all across this country, of independent citizens who wish to share in the experience of our staff. Such

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chapters and other citizen groups caintain their own structure and local objectives, but are advised by CDL of the legal precedents in their home states and other jurisdictions where legal issues are decided that affect local action. Although citizens usually desire fast and certain solutions to their perceived problems, and often misunderstand the restrictions of the law and Constitution on such solutions, CDL maintains that the law can deal effectively with criminal abuses of prostitution, live sexual commercialization, and hard-core pornography. CDL believes that only through persistent enforcement of civil and criminal obscenity, prostitution, and racketeering laws can this issue of pornography be truly solved, but recognizes that related laws and

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ordinances can help reduce the impact of

ordinances, minors' display laws,
licensing regulations, and other tangent
police power enactments. Therefore, the
zoning and licensing scheme of the City
of Dallas is important to the future
plan of all cities. This scheme
combines many features of other
ordinances and this case will set
precedents on several central issues
related to local control of the
commercial sex industry.

cDL is constantly requested by law enforcement agencies, state legislatures, city councils, and private citizens for advice and guidance on methods to enforce and improve existing laws regulating the distribution of obscenity and pornography and recognizes this case as a major precedent in the area of locating and controlling the effects of commercial sexual

exploitation on the local level. Since 1976, American cities have sought to take advantage of the benefits of zoning ordinances, to compliment the enforcement of criminal laws, in the wake of the approval of the Detroit zoning plan. This ordinance of the City of Dallas is one of the most comprehensive versions of these zoning principles and is important as a model for other cities across the country. Although general zoning laws have historically been treated as an area of local concern, the predominant forum for litigating sexually oriented business regulations has been the federal court system, thus preventing the authoritative construction and fact-based interpretation which could have occurred on the state level. This situation makes all the more important any opinion by federal courts on the

face of the Dallas ordinance and will affect the decisions of many city officials who wish to follow the careful and studied lead set by the Dallas City Council. This is true not only in Texas, but in practically every state, since cities everywhere are struggling with the growth of hard-core pornography businesses, live sex shows, nude dancing bars and lounges, and prostitution in all its modern disguises. Public health and law enforcement officials see this growth as a major factor in the spread of disease, sex crimes and abuse, and the related crimes of violence and corruption which accompany organized crime activities.

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CDL's legal staff is engaged in numerous efforts to advise officials and citizens on effective means to minimize these harms and control the location and abuse of sex establishments through

ordinance as a proper and significant model for modern cities. In the interest of obtaining such a valuable tool for other cities, CDL wishes to stress a few related points of law in this action which are important to this field of First Amendment inquiry. The parties have written comprehensive arguments on the specifics of this zoning law and CDL will not repeat them here but rather highlight certain concepts we wish this Court to consider.

Therefore, CDL respectfully requests this Honorable Court to grant leave to file the attached Brief Amicus Curiae in this important case, and to deny the Petition for a Writ of

Certiorari or, if granted, to reverse the Court of Appeals on the grounds of abstention and injunctive relief which were inappropriatly decided in the courts below.

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Respectfully submitted,

Bruce A. Taylor
Attorney for CDL

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## SUMMARY OF ARGUMENT

In addition to the reasons that the Dallas zoning ordinance is constitutional as stated by the District Court and Court of Appeals below, the Petition for a writ of certiorari should be denied in this case, and in the related cases in Nos. 87-2051 and 88-49. for the reasons that the federal courts below should not have heard these challenges and should have abstained from reviewing the ordinance, as not facially invalid in toto and incapable of state court construction, or should have at least restrained from granting any injunctive relief after a declaratory judgment was issued, in absence of any evidence that the City authorities and state courts would not have respected the federal declaration.

### LAW AND ARGUMENT

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I. THE DISTRICT COURT SHOULD HAVE
ABSTAINED FROM REACHING THE MERITS
OF THE CASE AND ALLOWED THE
ORDINANCE TO BE REVIEWED AND
INTERPRETED IN THE STATE COURTS
OF TEXAS, AND THE COURT OF APPEALS
SHOULD HAVE SO HELD.

Although the District Court spent considerable time preparing a comprehensive and reasoned opinion, Dumas v. City of Dallas, 648 F. Supp. 1061 (N.D. Tex. 1986). Amicus submits that the federal court should have deferred to the state courts for resolution of these issues. The District Court devoted the time and research it felt necessary to treat seriously the sensitive questions of First Amendment law involved in these cases. The District Court was affirmed, sub nom FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298 (5th Cir. 1988), and from this decision the instant Petition was

filed. The Court of Appeals, at 1301, upheld the exercise of jurisdiction by the Distrct Court because "this is a genuine and not a hypothetical controversy" and rejected abstention because "there were no pending state proceedings, none have been instituted, and we are not pointed to any possible construction of the ordinance by state courts that might make imprudent our exercise of jurisdiction".

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837 F. 24 1298 (50N' CLT. 1988), AND EDGE

OF TEXAS, AND THE COURT OF APPEALS

The federal courts should not be burdened with anticipatory challenges to newly enacted state statutes and city ordinances merely at the choice of forum of interested plaintiffs. Even assuming these Plaintiffs would have standing as affected or de-facto threatened targets of the new law, the state courts are equally qualified to hear their constitutional challenges. As this Court is well aware, the direct

application of Younger v. Harris, 401

proceedings, none have been instituted,

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U.S. 37 (1971), is rare since obscenity and sex business zoning ordinances are normally challenged in federal court before the laws can go into effect or be enforced by local authorities. This is done so as to seek attorneys fees under 42 U.S.C. § 1988 if plaintiffs prevail. Prevailing in federal court is easier and more likely than in state court since federal courts cannot construe state laws but may only declare them valid or invalid and declare whether any invalid provision or application is severable, as directed by Brockett v. Spokane Arcades, 472 U.S. 491, 86 L.Ed.2d 394 (1985). State courts, on the other hand, can and usually must first attempt to interpret or authoritatively construe state and city laws in a constitutional sense and thereby settle the controversy by

removing any threat or possibility of unconstitutional application.

This argument is not made with any disrespect for federal courts. State laws cannot be interpreted readily in federal court as they must be in state courts. See: Metromedia v. San Diego, 453 U.S. 490, fn.26 (1981), U.S. v. 37 Photographs, 402 U.S. 363 (1971). The state courts, conversely, can and must interpret state statutes so as to save them. See: Guaranty Trust v. Blodgett, 287 U.S. 509, at 513 (1933), Kingsley Pictures v. Regents, 360 U.S. 684, at 688 (1959), Mishkin v. New York, 383 U.S. 502, at 507-08, 510-11 (1966), Ward v. Illinois, 431 U.S. 767, at 772-73 (1977).

The Texas courts have such a duty to construe Texas laws and have evidenced their willingness and ability to do so in the First Amendment area.

See: Andrews v. State, 652 S.W.2d 370
(Tex. Cr. App. 1983). In Andrews, the
Texas Court of Criminal Appeals added
interpretations to definitions and
applications of the state criminal
obscenity laws, following the decision
of the Court of Appeals to abstain as to
certain issues in Red Bluff Drive-In v.

Vance, 648 F.2d 1020 (5th Cir. 1981).

Amicus submits that, in exercising its "jurisdiction to determine jurisdiction", the federal courts should abstain from reaching the merits of newly enacted state legislation unless there are extraordinary circumstances warranting federal intervention to prevent manifest injustice. This abstention policy should follow the guidelines of Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941), in order to await state court action.

As was done in United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 (1962), this Court should hold that the District Court or the Court of Appeals should have ordered the Plaintiffs to file a request for relief under the Texas Declaratory Judg ent statutes. United Gas, supra at 135-36, an interpretation of state law was made in federal court "in advance of construction of the License Code by the courts of the State, which alone, of course, can define its authoritative meaning". This Court saw a potential conflict between the federal ruling and that which could be made by the state courts, and continued at p. 135:

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The availability of appropriate declaratory judgment proceedings under Ala. Code . . . avoids this unsatisfactory dilemma.

This would also give credence to the principles advanced by this Court in

Moore v. Sims, 442 U.S. 415, at 425 (1979):

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Under established principles of equity, the exercise of equitable powers is inappropriate if there is an adequate remedy at law. . . . Restated in the abstention context, the federal court should not exert jurisdiction if the plaintiffs "had an opportunity to present their federal claims in the state proceedings." [Emphasis the Court's] . . . Certainly abstention is appropriate unless state law clearly bars the interposition of the constitutional claims.

It was also made clear in Moore v.

Sims, that a broad attack on a statute does not ease abstention requirements, but that the opposite is true in light of the state court duty to interpret its own laws. As stated at 442 U.S., 427:

The breadth of a challenge to a complex state statutory scheme has traditionally militated in favor of abstention, not against it. This is evident in a number of distinct but related lines of

abstention cases which, although articulated in different ways, reflect the same sensitivity to the primacy of the State in the interpretation and subsequent invalidation of part of an integrated statutory framework.

The Court then reiterated the purpose of the <u>Pullman</u> doctrine, at 428:

There is first the Pullman concern: that a federal court will be forced to interpret state law without the benefit of state court consideration and therefore under circumstances where a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time -- thus essentially rendering the federal court decision advisory and the litigation underlying it meaningless. . . .

The extension and broad application of <u>Pullman</u> principles is more important now than in years past. In 1976,

Congress repealed the three-judge federal court process for reviewing state laws, feeling that the abstention

doctrines would safeguard federalism. In that year, the Congress also enacted the attorneys fees section of 42 U.S. C. 1988. Amicus submits that actual deprivations of civil rights by past bad faith conduct of state officials is entitled to protection by federal courts and rewarded by payment of successfully vindicated plaintiffs' fees, but that prospective declaratory-type actions at the choice of plaintiffs should be at the costs of each party unless similar bad faith is shown. In the absence of the protection and right to direct appeal that the states lost when the three-judge court provision was removed, the states and cities deserve the opportunity to review, and correct by authoritative construction if necessary, new statutes and ordinances.

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In <u>Steffel v. Thompson</u>, 415 U.S. 452, 468-69, 475 (1974), this Court held

that, where there is no state criminal or civil case pending, federal courts may consider declaratory relief even though injunctive claims would still need to meet the equitable rules and involve extraordinary circumstances. In 1974, this Court found that federalism had little application where no state case was pending, Steffel, at 462, but such is no longer true. Steffel, discusses, at 465-68, the "storm of controversy" between federal and state jurisdiction which led to the establishment of the three-judge court system and the enactment of the federal Declaratory Judgment Act. The intent of Congress in repealing the three-judge court with direct appeal in 1976 was to return the court systems to normal where each system primarily reviewed its own cases and laws, with trust that this Court's abstention cases would protect

countries of the particular of hearth and

the integrity of the state and local legislatures. Such a situation can exist now if the federal courts set guidelines for determing the propriety of hearing cases involving state law.

Abstention should be the rule and a prospective plaintiff should bear the burden of showing a clear need to litigate in federal court rather than in the state system.

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Also prior to 1976, this Court stated in <u>Doran v. Salem Inn</u>, 422 U.S. 922, at 930 (1975):

The principle underlying Younger and Samuels is that state courts are fully competent to adjudicate constitutional claims, and therefore a federal court should, in all but the most exceptional circumstances, refuse to interfere with an ongoing state criminal proceeding. In the absence of such a proceeding, however, as we recognized in Steffel, a plaintiff may challenge the constitutionality of the state statute in federal court, assuming he can satisfy the

requirements for federal jurisdiction.

The "requirements for federal jurisdiction" are different now than in 1975, in light of recent developments in the law of federal court review of state laws, and calls to the forefront the caution expressed in Moore v. Sims, at 429-30:

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The final concern prompted by broad attacks on state statutes is the threat to our federal system of government posed by "the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes." . . . Almost every constitutional challenge . . . offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interest. When federal courts disrupt that process of mediation while interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals. . . . The price exacted in terms of comity would only be

outweighed if state courts were not competent to adjudicate federal constitutional claims--a postulate we have repeatedly and emphatically rejected. . . .

The principles which should now govern federal jurisdiction to review new state laws are based on solid precedent and are necessary to prevent local authorities from facing the burden of costly and duplicative litigation now that finality is not assured by the direct appeal from three-judge district courts and the need to follow up federal court challenges with federal appeals and then new state actions and state appeals. The federal courts with their increased workload would also benefit. with no deprivation to aggrieved plaintiffs since they can seek and achieve what they need to protect their civil rights in state courts, which is a constitutional interpretation of the new

law which avoids unfair applications and directs the enforcement by public officials.

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In attacking new statutes or ordinances for facial and applied invalidity, various points are determinative. In Fenner v. Boykin, 271 U.S. 240, at 243-44 (1926), this Court held that, in the absence of a pending state prosecution, a federal complaint must be dismissed and injunctive relief denied against possible or even threatened future prosecutions only "under extraordinary circumstances where the danger of irreparable loss is both great and immediate". In Huffman v. Pursue, 420 U.S. 592, at 602-02 (1975), this Court explained that the rule of Fenner was expanded in Younger v. Harris, 401 U.S. 37, at 46 (1971), to require that plaintiffs "must show not merely the 'irreparable injury' which is

a normal prerequisite for an injunction, but also must show that the injury would be 'great and immediate'".

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Younger, at 47-51, continued to point out that extraordinary circumstances would be found where facts are pleaded and proved to show the type of bad faith and harassment by the state which was present in Dombrowski v. Pfister, 380 U.S. 479 (1965). This Court also noted that federal intervention might also be justified if the statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made apply it". Younger, at 53-54 (citing Watson v. Buck, 313 U.S. 387, at 402 (1941)). However, the Court concluded that "we unequivocally held that facial invalidity of a statute is

not itself an exceptional circumstance justifying federal interference with state criminal proceedings". These rules apply whether prosecutions are pending, as in Younger, or merely threatened as in Fenner, and apply here where prosecutions or civil actions by the City are merely possible and injunctions are requested.

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The prevailing abstention and injunction cases should teach that the Civil Rights Act was intended to allow federal intervention only where there is bad faith or harassment, or a totally invalid ordinance incapable of a narrowing state construction, and where adequate remedies are totally lacking to provide procedural due process in state courts. Fenner, supra at 244, stated that an "intolerable condition would arise if, whenever about to be charged with violating a state law, one were

permitted freely to contest its validity by an original proceeding in some Federal court". In Parratt v. Taylor, 451 U.S. 527, 542-44 (1981), it was held that in order to state a claim under Section 1983, a plaintiff must show that available state procedures are not even adequate to compensate a suffered deprivation. Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981), held under Parratt that a plaintiff must affirmatively show that post-deprivation tort remedies under state law were deficient in order to state a Section 1983 claim for intentional assault and battery. In Vicory v. Walton, 721 F.2d 1062, at 1065 (6th Cir. 1983), the Court stated that: "Policy considerations do not require a federal hearing in procedural due process cases that can be corrected in

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state court." The Court in <u>Vicory</u>, supra at 1065-66, went on to hold:

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Section 1983 was not meant to supply an exclusive federal remedy for every alleged wrong committed by state officials. Rather, the statute is a remedy for only those wrongs which offend the Constitution's prohibition against property deprivations without procedural due process. Thus we hold that in section 1983 damage suits claiming the deprivation of property interest without procedural due process of law, the plaintiff must plead and prove that state remedies for redressing the wrong are inadequate. In a procedural due process case under section 1983, the plaintiff must attack the state's corrective procedure as well as the substantive wrong. In the instant case the plaintiff has neither alleged nor shown any significant deficiency in the state's remedies.

In Allen v. McCurry, 449 U.S. 90, at 100-01 (1980), this Court noted the three circumstances for federal remedies under Section 1983; (1) state law is facially and totally unconstitutional,

(2) state procedural law is inadequate to allow full litigation of a constitutional claim, and (3) where the procedural law is adequate in theory but inadequate in practice. "In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights."

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The mere possibility, or even certainty, of enforcement of a new statute or ordinance should not defeat abstention since it is the availability of that state court forum which protects the affected parties in their ultimate legitimate rights. It has been held that facing a state prosecution is not in itself an "extraordinary circumstance", absent bad faith and irreparable harm. See: Douglas v. City of Jeannete, 319 U.S. 157, at 162-64 (1943), Watson v. Buck, 313 U.S. 387, at

400 (1941), and Spielman Motor Co. v. Dodge, 295 U.S. 89, at 95-96 (1935).

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Abstract rules of standing should not be determinative, as the District Court below treated this issue, Dumas v. City of Dallas, 648 F. Supp. 1061, 1067-68 (N.D. Tex. 1986), and the federal courts, including this court, should be mindful of the serious problems of federal-state comity which arise when the case proceeds through the federal system, as was done in Vance v. Universal Amusement Co., 445 U.S. 308 (1980), affirming 587 F.2d 159 (5th Cir. 1978), which affirmed 404 F. Supp. 33 (S.D.Tex. 1975). It would be better to follow the abstention path urged by Chief Justice Burger and Justice Powell in Vance, 445 U.S., at 317-20 (dissent), and avoid the duplicative litigation now needed to construe and enforce the Texas nuisance statute reviewed in Vance.

Even though the federal cases provide guidance for the state courts when the laws are later enforced and reviewed locally, such guidance is not always determinative, as seen by the result of the Court of Appeals' decision in Red Bluff, supra, and its follow up in Andrews v. State, supra. In this case, the excellent and comprehensive opinion of the District Court below in Dumas, supra, and that of the Court of Appeals in FW/PBS, Inc. supra, would be likely to resolve most, if not all, the issues for the state courts, nevertheless the process must be duplicated at great cost in time, money, and effort by all parties, with final resolution several years delayed. In fact, each of the four subsections of the ordinance which the District Court declared invalid, and severable and enjoined, can and could be

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rendered constitutional by limiting and

narrowing constructions by state judges and by the city officials. Dumas, supra 648 F.Supp. at 1072-75. These are precisely the type of unsettled questions of fact under state law which Pullman and Congress sought to leave to the state courts. They are not "flagrantly" unconstitutional in every sense, under the Watson v. Buck rule, 313 U.S. at 402, cited in Younger at 401 U.S., 53-54, nor as stated in Village of Hoffman Estates v. Flipside, 455 U.3. 489, 494-95 fn.5 (1982), that the law is "unvalid in toto - and therefore incapable of any valid application".

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Combining the federal jurisdiction test of Allen v. McCurry, 449 U.S. at 100-01, with the Watson v. Buck rule of facial invalidity would provide a workable method for federal courts to exercise their "jurisdiction to determine jurisdiction" in a way which

would protect worthy and needy plaintiffs and pay deference to the state system.

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As set out above, the Allen test is threefold under 42 U.S.C. 1983:

- 1. the state law is facially and totally unconstitutional (meets the rule of Watson v. Buck as stated in Younger v. Harris).
- 2. state procedural law is inadequate to allow full litigation of constitutional claims (lack of due process provisions in criminal or civil enforcement procedures, lack of available state declaratory judgment act, lack of appeal provisions).
- 3. state procedural law is adequate in theory but inadequate in practice (bad faith enforcement, pattern of harassment, grave fact situation such as in Dombrowski v. Pfister).

This method of testing federal complaints would still allow affected plaintiffs who find themselves subject to harassment or in extraordinary circumstances under a totally

unreasonable state law or ordinance,
where the state courts or local
authorities appear unwilling or unable
to fairly decide the constitutional
claims, to achieve federal declaratory
relief and then injunctive relief if
necessary. Otherwise, the challenge to
state law belongs in state court.

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II. THE DISTRICT COURT ERRED IN ENJOINING THE CITY FROM ENFORCING THE SUBSECTIONS OF THE ORDINANCE DECLARED UNCONSTITUTIONAL AND SHOULD HAVE LIMITED ITS ORDER TO A DECLARATORY JUDGMENT AS TO THEIR VALIDITY AND SEVERABILITY, AND THE COURT OF APPEALS SHOULD HAVE SO HELD.

Even where declaratory relief is appropriate, federal courts must still consider injunctive claims separately and an injunction should issue only where there is evidence that the federal declaratory order will be ignored in bad faith.

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Although the federal courts, in determing whether to entertain the lawsuit challenging a state statute or ordinance, should deal with the threshold questions of jurisdiction as invoked by the presence of a totally invalid statute as well as the lack of an adequate remedy in state court, the federal courts should also refuse to

entertain injunction claims under 42 U.S.C., Section 1983, until after the declaratory relief has been considered and determined. As a general rule, the federal courts should at most issue a declaratory judgment where the circumstances require, and only issue an injunction if there has been a deprivation of civil rights shown by past bad faith conduct or a need to issue an injunctive order to protect the integrity of the federal declaratory order. If the federal court is not shown that the declaratory judgment will be ignored in bad faith by state officials, no injunction should be considered. Furthermore, an award of attorney fees should only be assessed against state officials where the challenge to the statute is shown to be required and justifies an injunction

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past or present deprivation of the federal plaintiff's civil rights.

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Even under the pre-1976 rules as evidenced by Steffel v. Thompson and Doran v. Salem Inn, declaratory relief is the primary remedy available and injunctive relief should be used only preliminarily while the federal court determines the issues and refrained from on a permanent injunctive basis unless proven necessary to enforce the declaratory judgment and protect the plaintiffs against bad faith retaliation. As stated in Doran v. Salem Inn, 422 U.S. at 931:

At the conclusion of a successful federal challenge to a state statute or local ordinance, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary.

The policy expressed in Steffel and Doran also recognized that the intrusion of injunctions should be imposed only to prevent manifest injustice and in necessary aid of the federal court's jurisdiction. A federal court should not entertain a prayer for injunction unless bad faith is evident, especially where declaratory relief would suffice to protect the rights of the plaintiffs. Only where the court is shown that the city or state would disregard the declaratory judgment or retallate against the plaintiffs should an injunction issue. As stated in McCarthy v. Briscoe, 553 F.2d 1005, at 1007 (5th Cir. 1977):

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This Court presumes that Texas will not defy the holding of unconstitutionality in the absence of an injunction.

In this case, the District Court declared four subsections of the Dallas

ordinance unconstitutional on their face and added an injunction order to the Order of Judgment, and in its opinion in Dumas, 648 F.Supp. at 1072. This additional remedy was not warranted in light of the admitted good faith of the Dallas City Council and absence of pleading or proof that the City or its agents would enforce the provis ons in bad faith or contrary to the declaratory order on summary judgment issued by the District Court. The Court of Appeals should have corrected this procedural error in its opinion below, and if this Court grants review the error should be reversed and guidelines issued to prevent such error in other cases.

Such an injunctive order also
prevents the City from enforcing the
provision in a state court proceeding,
even where the City would seek and the
state court would be willing to construe

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these four sections in a constitutional fashion. The City can still bring a state court declaratory action to clarify and narrow those four subsections, under the mandate of Dombrowski v. Pfister, 380 U.S. at 491:

The State must, if it is to invoke the statutes after injunctive relief has been sought, assume the burden of obtaining a permissible narrow construction in a noncriminal proceeding before it may seek modification of the injunction to permit future prosecutions.

Such a narrowing construction of these four subsections, and possibly other sections if a state court perceives the need, could have been sought immediately by the City in enforcing the zoning ordinance in the normal fashion, thus avoiding a separate and costly intervening lawsuit before these ordinance provisions can be implemented. It may be that the City would forego these provisions, but that

decision should be a local political and legal issue for city officials and not be burdened or usurped by unnecessary consideration of time and expense.

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#### CONCLUSION

The need for clarity in determining federal jurisdiction and in exercising separate declaratory and injunctive powers of federal courts is evident, especially here where the District Court made an obviously honest effort to be fair to all parties and settle as many issues as it felt were available for federal court determination. However, in light of the ultimate conclusion of the District and Appeals courts that the Dallas ordinance was constitutional in all respects except four instances, it cannot be said that there were extraordinary circumstances, or that the law was facially unconstitutional under Watson v. Buck and Younger v. Harris, or decision seculation as local political and

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applied or narrowed by construction the questioned four provisions, or that there was any bad faith harassment possible or threatened.

After considering the arguments and facts presented, the District Court should have, Amicus submits, applied the Allen v. McCurry test and abstained from issuing final judgment and certainly refrained from adding an injunctive order, and the Court of Appeals should have so held.

Nevertheless, since the ordinance is so clearly constitutional and valid, this Court need review it no further and should deny the writ of certioperi.

This case is indeed important for the City of Dallas, other cities in Texas, the legislatures of states within the Fifth federal Circuit, and for other

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state and local jurisdictions looking

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but there is certainly a tempest of

political "storm of controversy" over

federal-state jurisdiction in Congress,

unrest among states and cities seeking

social and legal problems in an orderly,

to pass legislation to solve serious

cost effective, and timely fashion.

grant the writ, that the Court will

jurisdiction issues as a threshold

Amicus prays that, if this Court does

consider these abstention and federal

consideration as a way to be sensitive

to the ever present concern for comity

and federalism. Give the state courts a chance and allow the federal courts to reserve their considerable power for those situations demanding protection for plaintiffs in peril. The states and cities can ask for no more.

Respectfully submitted,

Bruce A. Taylor
Attorney for Amicus Curiae

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#### CERTIFICATE OF SERVICE

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I hereby certify that three copies of the foregoing Brief Amicus Curiae of Citizens for Decency through Law, Inc. have been mailed this 13th day of July, 1988, to the following counsel of record:

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# AMICUS CURIAE

# BRIEF



## Supreme Court of the United States

OCTOBER TERM, 1988

FW/PBS, Inc., et al., Petitioners,

THE CITY OF DALLAS, TEXAS, et al., Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE PHE, INC., IN SUPPORT OF PETITIONERS

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## Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2012

FW/PBS, Inc., et al., v. Petitioners,

THE CITY OF DALLAS, TEXAS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE PHE, INC., IN SUPPORT OF PETITIONERS

#### INTEREST OF AMICUS 1

PHE is a North Carolina corporation that, together with sister corporations, is engaged in the business of mailing throughout the Nation various materials protected by the First Amendment, including sexually explicit magazines and videotapes, contraceptives, a medical newsletter entitled Sex Over Forty (which is edited by a physician), and a newspaper entitled Executive Health Report. PHE's sexually explicit speech is sent only to adults, and only upon request.

<sup>&</sup>lt;sup>1</sup> Petitioners and respondents both have consented to the filing of this amicus brief. Their letters of consent are being lodged with the Clerk.

PHE has taken great care to assure compliance with state and federal obscenity laws. In addition to conducting rigorous multiple review procedures that include review of sexually explicit materials by independent psychologists and sociologists, the company has met with law enforcement officials and sought their advice to ensure that no arguably obscene material is distributed by PHE. PHE has strictly abided by the advice it has received.

PHE does, however, distribute constitutionally protected expressive material of the type subject to regulation under the Dallas, Texas, ordinance at issue in this case. As a nationwide distributor of expressive materials, PHE is concerned and deeply affected by local laws that burden its rights or the rights of others to engage in expressive conduct. It wishes to participate in this case to explain the constitutional infirmities of the Dallas, Texas, licensing ordinance at issue. In particular, PHE wishes to focus on two constitutional infirmities that are of great concern to all authors and distributors of sexually expressive material: the restraint on presumptively constitutionally protected materials imposed by denying booksellers previously convicted of speech crimes the right to engage in expressive conduct; and the burdens and restraints imposed on all booksellers' rights to engage in expressive conduct.

#### SUMMARY OF ARGUMENT

The licensing provisions of the Dallas Ordinance are unconstitutional.<sup>2</sup> The Court of Appeals ruled that Dallas' invocation of the phrase "secondary effects" somehow suspends the central principles of the First Amendment. According to the Court of Appeals, because the

city allegedly was seeking to avert "secondary effects" of speech, the courts must apply a highly deferential standard of review to licensing provisions that flatly prohibit concededly constitutional speech by certain individuals, and burden, and thereby chill, the exercise of First Amendment rights by other individuals.

To the extent the Ordinance prohibits persons convicted of speech crimes, such as obscenity, from selling constitutionally protected materials, the Ordinance imposes a prohibited prior restraint. The "effect" sought to be averted by this regulation is the "primary" effect of further speech crimes. Because the Ordinance to achieve this goal deliberately suppresses constitutionally protected speech before it is uttered, and includes none of the safeguards required by this Court's prior restraint cases to ensure that protected speech is not restrained, the Ordinance is plainly unconstitutional. Point I.A.

Similarly, the licensing scheme is unconstitutional insofar as it imposes a restraint on persons convicted of other "sexually oriented" crimes, and insofar as it burdens anyone wishing to engage in the speech the Ordinance regulates. Flat prohibitions and content-based burdens imposed on speech are subject to strict scrutiny; only if the restriction is narrowly drawn to accomplish a compelling state interest is it constitutional. Banning an individual from selling constitutionally protected speech is not a narrowly tailored means of preventing prostitution or other crimes; other measures, including City of Renton-type zoning or recidivist statutes, are far more likely to be effective, and have less impact on speech. Similarly, the burdensome licensing requirements uniquely imposed upon sexual speech by the Ordinance are grossly underinclusive and overinclusive. Point I.B.

The Court of Appeals, in upholding these extraordinary restraints, misapplies this Court's rulings in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986),

<sup>&</sup>lt;sup>2</sup> Amicus, as a national mail-order distributor of constitutionally protected materials, does not have an interest in addressing the zoning provisions of the Ordinance, and therefore limits its participation in this case to the licensing provisions.

and Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). Those cases hold that certain carefully drawn zoning schemes—a particular type of time, place or manner restriction—may be upheld if they regulate certain "secondary effects" of sexually-explicit speech businesses. Essential to those decisions was the Court's finding that zoning regulations prevented no one from engaging in any protected speech. "Ample alternative channels for communication" remained open. Those cases do not authorize outright prohibition or licensing of speech defined by the content of that speech. To permit direct content-defined restraint of protected communication based on loose assumptions about its detrimental effects would be to remove the heart of the First Amendment. Point II.A.

Nor would the subjective belief of some that sexually oriented speech is "less valuable" than other types of speech justify these licensing restrictions. Speech about sexuality is highly valued by many citizens in this country, and sexually explicit elements have a significant place in many of our finest works of literature and art. Imposition on First Amendment jurisprudence of subjective heirarchies of value within the realm of protected speech has repeatedly been rejected by this Court, and should be rejected here. Judges should not be the ones to decide which protected speech is worthy of attention and which should be eschewed. That decision is properly left by the First Amendment to the individual citizen. Point II.B.

#### ARGUMENT

- I. THE DALLAS LICENSING ORDINANCE RESTRAINS AND CHILLS PRESUMPTIVELY CONSTITUTIONALLY PROTECTED EXPRESSION IN VIOLATION OF WELL-ESTABLISHED FIRST AMENDMENT PRINCIPLES.
  - A. When Predicated On A Past Speech Offense, License Denial Or Revocation Is An Unconstitutional Restraint On Presumptively Protected Expression.

The Dallas Ordinance authorizes denial (or revocation) of licenses to sell expressive materials "which depict or describe 'specified sexual activities,'" to persons or spouses of persons previously convicted of obscenity or "sale, distibution, or display of harmful materials to [a] minor." Ordinance No. 19377, Sec. 41A-5(10) (ee) & (ff). Such denial (or revocation) constitutes direct, affirmative government prohibition of future expression based upon the content of previous expression. As this Court made clear in Arcara v. Cloud Books, Inc., the strictest level of First Amendment review pertains where "a significant expressive element drew the legal remedy in the first place." 478 U.S. 697, 706 (1986). The remedy of license denial or revocation, when triggered by a prior speech-offense conviction is plainly drawn by "an expressive element." 8 Thus, the strictest standard of First Amendment review must be applied.

The Court of Appeals suggested, however, that a significantly lower standard of review is applicable because the Ordinance is assertedly intended to avert certain "secondary effects" of speech, as that term was explained

<sup>&</sup>lt;sup>3</sup> See Arcara v. Cloud Books, Inc., 478 U.S. at 708 (O'Connor, J., concurring) (if a city "were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books . . . the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review"), quoted with approval, Fort Wayne Books, Inc. v. Indiana, 106 S.Ct. 916, 929 (1989).

in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). See FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1305 (5th Cir. 1988). This "secondary effects" rational is unavailing as applied to the Ordinance as a whole, as explained in Point II, infra, but it is particularly indefensible in the context of license denial or revocation based upon a prior speech offense. The City's purpose in revoking the license of one recently convicted of a specific crime is to deny that individual the "opportunit[y]" to commit that crime again.4 As the District Court-which also upheld the restriction-observed, the Ordinance is designed "to avoid licensure of those who have recently shown a predilection toward the criminal conduct the Ordinance was designed to overcome." Dumas v. City of Dallas, 648 F. Supp. 1061, 1074, n. 34 (N.D. Tex. 1986) (emphasis added).

Where the prior crime was sale of obscenity or "harmful material," license denial or revocation is based, therefore, upon the City's determination that the prior conviction shows a "predilection" toward unlawful speech, and it is intended to prevent repetition of the speech offense. Thus, the "effect" the City seeks to avert is anything but "secondary." To the contrary, Dallas is seeking to prevent a future speech crime by imposing a prior restraint on those who have committed such crimes in the past. Rather than "punish[ing] the few who abuse rights of speech after they break the law," Dallas has chosen to "throttle them"... beforehand." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975).

Incapacitation of a speaker based upon past speech offenses is a classic prior restraint prohibited by the First Amendment. Although license denial or revocation of nonspeech businesses may pose few constitutional problems, any attempt to prevent future speech must be carefully drawn "to avoid suppression of constitutionally

protected publications." Marcus v. Search Warrant, 367 U.S. 717, 730-731 (1961). In Near v. Minnesota, 283 U.S. 697 (1931), this Court condemned a scheme under which Minnesota "empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive." Kingsley Books, Inc. v. Brown, 354 U.S. 436, 445 (1957) (emphasis added). As the Eleventh Circuit has observed, "[i]n Near the Supreme Court condemned prior restraints prohibiting future expression that may fall within the purview of the First Amendment where such restraint is based only on a finding of unprotected present conduct." Gayety Theatres, Inc. v. Miami, 719 F.2d 1550, 1551 (11th Cir. 1983) (mem.) (affirming on basis of district court's opinion) (emphasis added). Such a restraint on future speech based upon a finding that past speech was unprotected is "'the essence of censorship.'" Kingsley Books, Inc., 354 U.S. at 445 (quoting Near, 283 U.S. at 713). Accord Organization for a Better Austin v. Keefe, 402 U.S. 415, 418-419 (1971) (holding unconstitutional an injunction "operat[ing] . . . to suppress, on the basis of previous publications, distribution of literature of any kind"). This censorship is plainly unlawful.

License denial and revocation based upon a prior speech offense cannot be upheld as a "criminal penalty," any more than it can be upheld as restraint to avert "secondary effects." License revocation and denial are essentially civil in nature, much like injunctive relief. They are regulatory actions, not punitive ones. Moreover, even if imposed as punishment for past crimes, license revocation and denial would remain a prior restraint. "As far back as the decision in Near v. Minnesota . . ., this Court has recognized that the way in which a restraint on speech is 'characterized' under state law is of little consequence." Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916, 929 (1989). See Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 68 (1981) ("the standard of

 $<sup>^4</sup>$  Preamble to Ordinance 19196, Finding as to Sexually-oriented Businesses, 2(c).

review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed"); Arcara v. Cloud Books, Inc., 478 U.S. at 697 (O'Connor, J., concurring); Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (per curiam); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. at 552-555; Marcus v. Search Warrant, 367 U.S. at 730. In the prior restraint context in particular, "the Court has regard to substance and not to mere matters of form, and [a] statute must be tested by its operation and effect." Near v. Minnesota, 283 U.S. at 708. Accord Speiser v. Randall, 357 U.S. 513, 520 (1958). Because the effect—and manifest purpose—of the licensing provisions as applied to persons convicted of speech offenses is to impose a prior restraint, they are unconstitutional, even if they could be rationalized as a form of punishment.5

To hold that Dallas might ban future speech upon conviction of a speech crime would destroy prior restraint doctrine, the centerpiece of First Amendment jurisprudence; any prior restraint could be imposed simply by styling it "punishment" after criminal trial. Whatever its purported rationale, denial or revocation of

a license to sell constitutionally protected materials based upon a prior speech crime is a prior restraint.

Although prior restraints are "not unconstitutional per se, . . . [a] ny system of prior restraint . . . 'comes to this Court bearing a heavy presumption against its constitutional validity.' "Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975). The prior restraint at issue is obviously unlawful because it satisfies neither of the rigorous requirements established in this Court's cases: First, it does not "fit within one of the narrowly defined [substantive] exceptions to the prohibition against prior restraints"; and second, it is not "accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech." Id. at 559.

Indeed, the central vice of the restraint is that it is intended to suppress constitutionally protected speech. To be lawful, of course, at a minimum a prior restraint must be designed to suppress only unprotected speech, such as obscenity, child pornography, or unprotected defamation. See id. at 555-556. But speech that "depict[s] or describe[s] 'specified sexual activities' or 'specified anatomical areas'" is entirely constitutionally protected unless it violates the rigorous three-part obscenity test established in Miller v. California, 413 U.S. 15 (1973). Here, the City has not even argued that the materials sold by petitioners are in any respect not constitutionally protected. 837 F.2d at 1307 (Thornberry, C.J., dissenting); 648 F. Supp. at 1068, n. 18. Dallas simply may not deliberately set about to impose a prior restraint on protected materials. See Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. at 939 (Stevens, J., dissenting in part); Thornhill v. Alabama, 310 U.S. 88, 97 (1940); Southeastern Promotions, Inc. v. Conrad, 420 U.S. at 555-556, 559: Organization for a Better Austin v. Keeje, 402 U.S. 415 (1971).

<sup>&</sup>lt;sup>5</sup> A similar "criminal penalty" argument was raised and rejected in *Near*. See 283 U.S. at 735-736 (dissenting opinion). But the *Near* Court, looking to the substance of the statute, recognized that its object was "not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical." *Id.* at 711.

<sup>&</sup>lt;sup>6</sup> This Court's rulings in Near and Vance, could be evaded by the simple expedient of changing the label under which the injunctions in those cases were imposed. Moreover, legislatures and municipalities would be free to enact "banning orders" as punishment for speech-related crimes. An individual convicted of burning his draft card, as in United States v. O'Brien, 391 U.S. 367 (1968), or an individual convicted of violating an injunction against street demonstrations, as in Walker v. City of Birmingham, 388 U.S. 307 (1967), could be banned from participating in any future political demonstration.

Furthermore, the Ordinance obviously does not employ the procedures required by the First Amendment to ensure that only unprotected expression is restrained. See Freedman v. Maryland, 380 U.S. 51, 58 (1965); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. at 559-562. Such procedures would be entirely superfluous in a scheme that deliberately suppresses protected communication.

License denial or revocation based on a prior speech offense is the most dangerous possible form of government censorship. Based on the prohibited presumption that a prior speech offense demonstrates a "predilection" to engage in future speech violations, it entirely prohibits the speaker from engaging in a whole category of protected expression. Compare Arcara v. Cloud Books, Inc., 478 U.S. at 705, n. 2 (ordinance upheld imposed "no restraint at all on the dissemination of particular materials, since respondent is free to carry on his bookselling business at another location"; and was predicated on non-expressive conduct). It poses profound danger to First Amendment values because the State, on "purpose," has "forbid[den] speech which is constitutionally protected." Vance v. Universal Amusement Co., 445 U.S. at 324 (White, J., dissenting). Because it deliberately prohibits presumptively constitutionally protected speech based solely upon prior speech offenses, the Dallas licensing ordinance is plainly unconstitutional.

#### B. The Licensing Provisions Of The Ordinance Prohibit And Chill Expressive Conduct In Violation Of The First Amendment.

Wholly apart from the fact that it imposes an unconstitutional prior restraint on constitutionally-protected speech, the Dallas Ordinance also prohibits certain booksellers from selling certain books, burdens the right of all booksellers to sell certain books, and discriminates among booksellers based upon the contents of the books they sell. In these ways as well, the Ordinance's licensing provisions violate the First Amendment.

1. Absent Exceptional Circumstances Government May Not Ban Or Burden Constitutionally Protected Expression.

The Dallas Ordinance imposes unique and burdensome requirements on everyone who sells or rents expressive material of a defined sexual content, including all books, magazines and videos depicting or describing certain sexual conduct, including the "erotic touching" of female breasts. It is no exaggeration to say that the majority of mainstream fiction sold today, and the majority of mainstream films and videotapes, could be understood to fall within the statutory definition. If one of a bookstore's "principle business purposes" is to sell such books, films, or videotapes, the bookstore is swept within the statute's reach. Most bookstores or video stores—and most theaters—fit this description.

Booksellers and other distributors have a First Amendment right to sell books containing sexually explicit descriptions, so long as the works taken as a whole are not obscene or otherwise unprotected. See Miller v. California, 413 U.S. 15 (1973). The "constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 65 n.6 (1963) (citation omitted) (emphasis added). See Smith v. California, 361 U.S. 147, 152 (1959) (State has no power to "restrict the dissemination of books which are not obscene"); Lovell v. City of Griffin, 303 U.S. 444 (1938) (distribution of expressive material is constitutionally protected). Cf. City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986) (editorial control exercised by cable TV operators is right protected by First Amendment); Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 255-256 (1974) (right of newspaper editor to determine which authors will and will not be published is protected by First Amendment).

The Dallas Ordinance prohibits the operation of any bookstore without a license if books sold there contain

the statutorily-specified sexual content. And the licensing requirements make it *impossible* for booksellers to obtain the required licenses (a) if within a specified period they or their spouses have been convicted of certain specified crimes, Ordinance No. 19377, Sec. 41A-5(4) & (10); (b) if they reside with someone who has been denied a license, id. § (5); or (c) if they managed a bookstore that sold "adult materials" and have "demonstrated" in the opinion of the licensing authority that they are "unable to operate" the business "in a peaceful and law-abiding manner, thus necessitating action by law enforcement officers." Id. § (8).

The licensing process is burdensome. To obtain a license a bookseller needs to secure health department, fire department and building official certifications of compliance with various codes, § 41A-5(6), pay a \$500 fee, id. § (7), and have no outstanding city taxes, fees, fines or penalties assessed against him in relation to a "sexually oriented business." Id. § (2).

The sweeping censorial impact of the ordinance cannot be overstated. Booksellers convicted of one of the predicate crimes (or those whose spouses have been convicted) must empty their shelves of vast quantities of constitutionally-protected material, including not only all so-called "adult" material, but also books such as Ulysses, The Canterbury Tales, and every other book that contains a description of sexual conduct, including "erotic touching." In order to comply with the law, booksellers who are not flatly disqualified by the licensing provisions must either empty their shelves of books with any sexual content, or satisfy the burdensome regulatory requirements and obtain a license. Rather than pay the statutory fee and spend the time needed to obtain all of the necessary permits, other bookstore owners may simply reduce their stock of books that fall under the statutory proscription, and run the risk of prosecution for operating a "sexually oriented business" without a license.

The inevitable result of this licensing scheme will be a significant diminution of the stock of constitutionally-protected material available in Dallas. Like the Dallas theater owners subject to the ordinance struck down in Interstate Circuit Inc. v. City of Dallas, 390 U.S. 676 (1968), booksellers may "choose nothing but the innocuous" rather than "run the risk" of being subject to these burdensome licensing requirements. "The vast wasteland that sometimes is described in reference to another medium might be a verdant paradise by comparison," if this ordinance were allowed to remain in force. Id. at 684.

This Court has repeatedly made clear that such outright bans and burdens on protected First Amendment activity are presumptively unconstitutional, and cannot stand unless they are precisely drawn to serve a compelling state interest. See, e.g. Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 540 (1980); Buckley v. Valeo, 424 U.S. 1, 45-46 (1976); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Near v. Minnesota, 283 U.S. 697 (1931); cf. Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 585 (1983) (differential taxation of press is unconstitutional because it "suggests that the goal of the regulation is not unrelated to suppression of expression"). "Free expression 'must not, in the guise of regulation, be abridged or denied." Grayned v. City of Rockford. 408 U.S. 104, 117 (1972), quoting Hague v. CIO, 307 U.S. 496, 516 (1939). First Amendment rights need "breathing space to survive," NAACP v. Button, 371 U.S. 415, 433 (1963), and are protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference." Bates v. City of Little Rock, 361 U.S. 516, 523 (1960). In particular, the Court has struck down regulations that re-

<sup>&</sup>lt;sup>7</sup> The last prohibition is not currently before the Court.

quire speakers to obtain a license before they speak, even when the licensing requirements merely burden, but do not ban, certain speakers. See, e.g., Riley v. Nat'l Fed'n of the Blind, 108 S.Ct. 2667 (1988); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Lovell v. City of Griffin, 303 U.S. 444 (1938).

As set forth below, see infra pp. 15-16, in no respect can the Ordinance satisfy this strict scrutiny.

### 2. The Licensing Ordinance Is An Unconstitutional Content-Based Prohibition Of Speech.

The Dallas licensing ordinance is doubly defective. Not only does it unconstitutionally ban and burden protected speech, it does so selectively based upon the content of that speech. Even if the Ordinance were otherwise constitutional—which it is not—except in "narrow circumstances" not present here, see Consolidated Edison Co., 447 U.S. at 538, the First Amendment does not allow such content-based prohibitions and penalties.

In Police Dep't v. Mosley, 408 U.S. 92 (1972), the Court held unconstitutional an ordinance that prohibited certain peaceful picketing in proximity to a school, but allowed other peaceful picketing in the same area, based solely upon the content of the message on the picket sign. "The central problem with [the] ordinance," the Court explained, "is that it describes permissible picketing in terms of its subject matter." Id. at 95. Similarly, in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), the Court struck down an ordinance restricting drive-in motion picture theaters from showing sexually explicit, but nonobscene films, if the screen was visible from the street. The Court identified a similar constitutional de-

fect in the ordinance; it was void because it "discriminate[d] among movies solely on the basis of content. Its effect [was] to deter drive-in theaters from showing movies containing any nudity, however innocent or even educational." *Id.* at 211 (citation omitted).

The Dallas Ordinance is unconstitutional for the same reasons the Court struck down the regulations in *Mosley* and *Erznoznik*. It violates the rights of booksellers and readers alike, and cannot stand absent some compelling justification wholly lacking here.

### 3. The Licensing Ordinance Cannot Survive Strict Scrutiny.

Without much explanation, the Court of Appeals ruled that the licensing ordinance was designed to avert the "secondary effects of sexually oriented businesses." FW/ PBS, Inc. v. Dallas, 837 F.2d at 1303. To the extent such so-called "secondary effects" are future speech crimes, the regulation imposes a prior restraint in clear violation of the First Amendment. The State may not restrain all future speech by a speaker on the assumption some of it will be unlawful-whether that assumption is based on prior speech crimes or some other alleged predictive factor. Nor may the State revoke First Amendment rightsother than the right to vote—as punishment for crimes. See, e.g., Genusa v. City of Peoria, 619 F.2d 1203, 1219, n.40 (7th Cir. 1980); Avon 42nd Street Corp. v. Myerson, 352 F. Supp. 994 (S.D.N.Y. 1972); Perrine v. Municipal Court, 5 Cal. 3d 656, 97 Cal. Rptr. 320, 488 P.2d 648 (1971), cert. denied, 404 U.S. 1038 (1972); City of Delavan v. Thomas, 31 Ill. App. 3d 630, 334 N.E.2d 190 (1975); Alexander v. City of St. Paul, 303 Minn. 201, 227 N.W.2d 370 (1975); Seattle v. Bittner, 81 Wash, 2d 747, 505 P.2d 126 (1973).

Moreover, to the extent that the restraint on speech is predicated on a prediction that recent violators of the specified criminal provisions will be repeat nonspeech

<sup>&</sup>lt;sup>8</sup> As the dissenting judge noted below, 837 F.2d at 1811, similar health and police prelicensing requirements imposed uniquely upon adult bookstores were struck down in *Genusa v. City of Peoria*, 619 F.2d 1203, 1214 (7th Cir. 1980).

offenders-or will in other ways contribute to urban decay to a degree greater than those who have not been recently convicted—the Ordinance is insufficiently tailored to achieve its goal. If, as this Court found in Renton and Young, there is reason to believe that concentrations of so-called adult businesses cause urban decay and certain types of crime, Dallas' zoning ordinance already prevents such concentrations. Moreover, the connection between a prior offense and the sale of certain books, on the one hand, and the sale of those books and commission of that offense again, on the other hand, is too tenuous to support a total restraint on protected expression. Whether or not barred from selling books, an individual intent on violating laws against prostitution or similar laws will do so. Zoning, enhanced penalties for recidivism, and aggressive enforcement of the laws will be far more effective in preventing such crimes than would a restraint on selling books. Indeed, the connection between the identity of the individual who owns the bookstore and the prevalence of such crimes is so tenuous, and such crimes can so clearly be addressed with other measures, that this "secondary effects" rationale appears to be a mere pretext for censorship.

Finally, there is no reason to believe that bookstores carrying books with sexual content pose any greater fire hazard than any other business. Nor is there evidence to suggest that owners of such bookstores pose a particular risk of unpaid taxes. Like the other restrictions, these licensing requirements simply burden the right to sell books of a certain content because the city disapproves of such content. See Schad v. Borough of Mount Ephraim, 452 U.S. at 72-74. The City's legitimate objectives could arguably be furthered by certain of the zoning provisions of the Ordinance, but neither logic nor experience suggests they would be significantly advanced by the licensing provisions. The licensing provisions, therefore, are unconstitutional.

## II. THE COURT OF APPEALS ERRED IN FINDING THAT THE ORDINANCE'S RESTRICTIONS WERE JUSTIFIED UNDER THE FIRST AMENDMENT.

In this Point, we explore the Court of Appeals' misguided ruling that the Ordinance is constitutional either because it is rationally related to some legitimate governmental purpose, or because the speech it burdens is not entitled to full constitutional protection. For the reasons set forth below, neither rationale can support the Dallas licensing Ordinance.

Although it recognized that it was "awkward to analyze this [licensing requirement] as a time, place or manner restriction within the framework of [City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)]," 837 F.2d at 1304-05, the Court of Appeals nevertheless without further explanation deemed Renton to be controlling and upheld the Ordinance on the ground that it was "designed to serve a substantial government interest" unrelated to the content of the speech, and only indirectly affected speech. 837 F.2d at 1303 (quoting Renton). In particular, incorrectly citing Renton, the court held that any regulation or prohibition of speech is constitutional, so long as it is justified by a desire to control some "secondary effect" of that speech, and the regulation bears some rational relationship to that goal.

The licensing provisions of the Dallas Ordinance are completely unlike the ordinance at issue in Renton. Renton concerned zoning, which this Court "analyzed as a form of time, place and manner regulation," following its similar analysis in an earlier zoning case, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1986). See Renton, 475 U.S. at 46. Time, place and manner restrictions, and, in particular, zoning regulations, are in crucial respects fundamentally different from licensing requirements. Unlike zoning, licensing potentially imposes a complete prohibition and a significant chilling effect on speech. By definition, zoning restrictions do not ban speech entirely—they merely regulate the place where

the speech may occur. Indeed, in Renton this Court explicitly premised its holding on the fact that speakers there could engage in the identical speech in a different place: "The Renton ordinance, like the one in American Mini Theatres, does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone. . . . The ordinance is therefore properly analyzed as a form of time, place and manner regulation." Id. at 46, citing American Mini Theatres. See also Consolidated Edison Co., 447 U.S. at 535 ("The Court has recognized the validity of reasonable time, place and manner regulations that serve a significant governmental interest and leave ample alternative channels for communication.") (emphasis added).

Precisely because zoning restrictions do not ban speech, and leave ample opportunities to engage in the expression at issue, they only incidentally impact rights at the core of the First Amendment—a speaker's right to speak, and an audience's right to receive information. They therefore have traditionally been subject to a lesser standard of scrutiny, not the heightened scrutiny applied to prior restraints and other forms of regulation that ban speech outright. As the Court stated in American Mini Theatres, the government is allowed greater liberty in regulating the time, place and manner in which speech is communicated, because such a restriction "does not, in itself, create an impermissible restraint on protected communication." American Mini Theatres, 427 U.S. at 62; see also Renton, 475 U.S. at 45.

The Court of Appeals erred in treating a licensing ordinance which bans and chills protected speech as a time, place or manner restriction. Unlike the regulations at issue in Renton and American Mini Theatres, the Dallas licensing law does not regulate the times at which a licensee may speak, the place a licensee may speak, or the manner in which he may speak, leaving him "ample alternative channels for communication." Consolidated Edison Co., 447 U.S. at 535. To the con-

trary, as the dissenting judge noted, here the time, place or manner of speech is "not merely being regulated; entire speech is being extinguished." 837 F.2d at 1310.

Accordingly, the Ordinance should have been analyzed in the same manner as the prohibitions, burdens, and chilling effects imposed on protected speech struck down in Consolidated Edison Co., Riley, and the other "strict scrutiny" cases cited above. It is presumptively unconstitutional, and cannot stand unless the City can demonstrate that it advances a compelling purpose and is narrowly drawn to accomplish that purpose. This is so whether or not the ban is content based, for such outright prohibitions of protected expression stri e at the heart of the guarantees of the First Amendment. See Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). Because the Court of Appeals failed to recognize this licensing law was not a time, place or manner regulation but an unconstitutional ban or penalty on speech, it applied the incorrect legal standard in evaluating the Ordinance. Its judgment must be reversed.

#### A. The Licensing Provisions Of Dallas' Ordinance Cannot Be Justified On the Ground That They Are Directed Only At The "Secondary Effects" Of Speech.

By improperly relying on *Renton*, the Court of Appeals took a legal principle created uniquely for zoning cases and applied it to a classic, content-based speech prohibition. The court found that because the city council's aim in enacting the licensing provisions may be explained without reference to the content of the speech they single out, and may be justified as an attempt to control certain "secondary effects" the city council found frequently accompanied such speech, the licensing provisions were "content neutral" and constitutionally proper so long as the regulation bore a reasonable relationship to the legislative purpose.<sup>6</sup>

<sup>&</sup>lt;sup>9</sup> Licensing restrictions, as we have seen, see p. 16, supra, have a far more tenuous connection to preventing these secondary effects than zoning laws.

This Court should reject the Court of Appeals' ruling that any ban on speech passes constitutional muster so long as it is rationally justified by reference to the "secondary effects of speech." In so ruling, the Court of Appeals has wrenched "secondary effects" analysis from its place in zoning cases and applied it to an ordinance that bans speakers engaging in expression based solely on the content of the expression. If this rationale were accepted, it would have disastrous consequences for all protected speech.

Virtually all contemporary speech regulation is "directed" at some alleged secondary effect of the speech. This Court has steadfastly refused to countenance prohibitions of speech justified by reference to its "secondary effects" e apt in a few narrowly defined sets of circumstances. Indeed, it is frequently the very goal of speech to create a "secondary effect," and certain secondary

effects may in other ways flow from the expressive content of the speech. Consequently, prohibtion of speech to control a "secondary effect" can impinge on First Amendment values as much as prohibition based on content. "[T]he whole history of the [censorship] problem shows it is to the end of preventing action that repression [of speech] is primarily directed." Thomas v. Collins, 323 U.S. 516, 537 (1945). The Dallas city council may believe that adult bookstores are magnets for crime, and the teaching of Renton is that under certain circumstances Dallas may enact zoning ordinances to address this problem. It is an entirely different matter to enact a licensing scheme whose certain effect will be the suppression of constitutionally protected expressive material of a certain subject matter, on the ground that such expressive conduct will attract "illegal sexual activity or solicitation." See City of Dallas Ordinance No. 19196, Finding No. 7. Such a scheme is clearly unconstitutional.

Unlike time, place and manner regulations, direct speech prohibitions completely muzzle a speaker and necessarily narrow the range of speech material available to those who desire to engage in constitutionally-protected expressive conduct. They therefore strike at the heart of the First Amendment. Accepting such speech prohibitions simply because they are in some way related to unwanted "secondary effects," would be flatly inconsistent with Brandenburg, Chaplinsky, and a long series of cases standing for the proposition that speech may not be banned because of the feared consequences of that speech except in rare and narrowly defined circumstances.

The principle inherent in the Court of Appeals holding—that any speech may be banned so long as the ban is based on a finding that a secondary effect of the speech is inimical to accomplishment of a legitimate government purpose—is virtually without limitation, and if adopted

<sup>10</sup> See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (State may criminalize speech when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words). Indeed, even in time, place and manner cases outside the zoning context, Renton's understanding of "content neutrality" has no valid application. Compare Tinker v. Des Moines Indep. School Dist., 393 U.S. 503 (1969) (rejecting State's argument that it was permitted to ban the wearing of armbands at school on the ground that it was a "place" restriction justified by reference to the risk of disorder); Police Dep't v. Mosley, 408 U.S. 92, 100-101 (1972) (rejecting argument that subject matter place restriction could be justified on ground that picketers carrying certain messages are more "prone to violence" than picketers carrying different messages. "Freedom of expression . . . would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis."). Cf. Arcara v. Cloud Books, Inc., 478 U.S. at 708 (O'Connor, J., concurring) (if true purpose of regulation is to suppress speech, then regulation of non-expressive activity demands strict scrutiny).

would permit the prohibition of substantial amounts of protected speech. In this case, for example, the ordinance at issue was assertedly enacted to "promote the health, safety, morals, and general welfare of the citizens of the city." City of Dallas Ordinance No. 19196, Sec. 41A-1 (a). One would be hard-put to imagine a content-based prohibition of speech that could not arguably be grounded on a finding that unless prohibited the speech could result in some "secondary effect" inconsistent with the "general welfare of the citizens of the city." The First Amendment, however, as it has always been understood by this Court, as a general matter limits the power of government to accomplish even legitimate objectives by directly restricting protected expressive activity.11 The exceptions to this principle must be few and narrow, and this Court should reject the Court of Appeals' misguided attempt to expand one of those exceptions so broadly as to swallow the rule it helps define.

#### B. This Court Should Not Apply A Less Protective Standard To Evaluate Regulations Governing Sexually-Explicit But Non-Obscene Speech.

The Court of Appeals in passing stated that "the fact that [the Ordinance] impinges on a lesser-protected category of speech might justify the application of some intermediate standard of review." 837 F.2d at 1305. Whatever the significance of the Court of Appeals' statement to its own ruling, 12 this Court should make clear that sexually explicit, but non-obscene, speech may not be

banned outright or significantly chilled to control its "secondary effects" merely because some may deem it to be less "valuable" than other types of speech protected by the First Amendment.

The Court generally has rejected government's attempts to label one class of expression as more or less valuable than another-indeed, government neutrality towards the expressive elements of speech lies at the heart of the values protected by the First Amendment. "[A] bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . There is an 'equality of status in the field of ideas." Police Dep't v. Mosley, 408 U.S. at 95-96 (citations omitted). See also FCC v. Pacifica Foundation, 438 U.S. 726, 761 (1978) (Powell, J., joined by Blackmun, J., concurring) ("I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection.").

Affording greater or lesser protection to speech based on the Court's sense of its value is inconsistent with core First Amendment principles. First, "[f]reedom of speech . . . protects the individual's interest in self-expression." Consolidated Edison Co., 447 U.S. at 534 n. 2. Ranking speech according to its supposed value discounts the speaker's interest, protected by the First Amendment, in expressing himself or herself, regardless of the value to any third person of what he or she has to say. "To permit the continued building of our politics and culture, and to assure self-fulfillment of each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control." Police Dep't v. Mosley, 408 U.S. at 95-96.

<sup>11</sup> See Buckley v. Valeo, 424 U.S. 1, 44-45 (1976) (speech limitations "cannot be sustained simply by invoking [a governmental interest]. Rather [their constitutionality] turns on whether the governmental interests advanced satisfy the exacting scrutiny applicable to limitations on core First Amendment rights").

<sup>12</sup> It is not clear from its opinion whether the court relied in part on this statement in ruling that the Ordinance need not pass strict scrutiny.

Second, adoption of the Court of Appeals' suggestion would make the government the arbiter of the value of speech, permitting the censorship of speech deemed "less valued." But under the First Amendment individuals, not government, must exercise that judgment. The "constitutional right of free expression" puts

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"the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."

Cohen v. California, 403 U.S. 15, 24 (1971). See Tashjian v. Republican Party of Connecticut, 479 U.S. 208,
224 (1987) (government "may not interfere [with expressions of First Amendment freedoms] on the ground
that [it] view[s] a particular expression as unwise or
irrational." (citation omitted)); Thomas v. Collins, 323
U.S. 516, 545 (1945) (Jackson, J., concurring) ("The
very purpose of the First Amendment is to foreclose
public authority from assuming a guardianship of the
public mind through regulating the press, speech, and
religion.").

Third, any attempt to create a hierarchy of protected speech based on the "value judgments" of judges would inevitably plunge this Court and lower courts into a thicket of highly charged and subjective judgments. There is no generally accepted objective hierarchy of value that courts could apply in evaluating speech even if it were otherwise appropriate for them to do so. "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." Bowers v. Hardwick, 478 U.S. 186, 194 (1986). In the past, the Court generally

has declined to make such judgments in the First Amendment area where value-neutrality is so central. The Court has not limited the full protection of the First Amendment to "political" expression; "entertainment, as well as political and ideological speech, is protected." Schad v. Borough of Mount Ephraim, 452 U.S. at 65. Nor has the Court granted greater protection to speech it deemed "rational" rather than "emotive." See, e.g., Cohen, 403 U.S. at 24.

Fourth, there is little justification for applying lesser protection to speech of a sexually explicit nature, even if value categorization could be justified in other contexts. Unless it cannot be prohibited under the first two prongs of the test established in *Miller v. California*, 413 U.S. 15 (1973), nonobscene sexually explicit speech must have "serious" value. Most speech affected by the Ordinance would certainly be found to have serious value. Nor could one reasonably say that this "serious value" is lesser than that of nonsexual speech. For example, it would be absurd to contend that the sexually explicit speech in Giovanni Boccaccio's *Decameron* is less valuable than the content of an obscure political tract.

Indeed, much sexually explicit speech, though often controversial and periodically the object of the censor's blotter, is far from valueless:

"[S]ex and obscenity are not synonymous. . . . The portrayal of sex, e.g., in art, literature, and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."

Roth v. United States, 354 U.S. 476, 487 (1957) (footnotes omitted). Many classic works of literature, down through the ages and into the modern era, contain sex-

ually explicit passages yet have "serious value"—indeed, many such books, motion pictures, etc. have the utmost value as art or philosophy.

Fifth, the line between artificial categories of speech is invariably "dim and uncertain," Bantam Books, 372 U.S. at 66, and a prudent publisher or speaker will "steer far wide" of all restricted depictions. Speiser v. Randall, 357 U.S. 513 (1958). For these reasons, even when dealing with unprotected obscenity, the Court has established strict safeguards to minimize the chilling effect on protected publications of government regulation of unprotected speech. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975); Smith v. California, 361 U.S. 147 (1959); Kingsley Books, Inc. v. Brown, 354 U.S. 436, 445 (1957). Any prohibition of sexually explicit speech on the ground that it has "little value" would inevitably chill the distribution of speech that has great value.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals upholding Dallas' licensing ordinance should be reversed.

Respectfully submitted,

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# AMICUS CURIAE

## BRIEF

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

In The

### Supreme Court of the United States

October Term, 1988

FW/PBS, INC., a Texas Corporation, d/b/a PARIS ADULT BOOKSTORE II; et al.,

Petitioners,

VS.

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Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF COLLEGE STORES, INC. AND THE FREEDOM TO READ FOUNDATION, AS AMICI CURIAE, IN SUPPORT OF PETITIONERS.

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#### **STATEMENT**

The American Booksellers Association. Inc., Association of American Publishers, Council for Periodical Distributors Associations, International Periodical Distributors Association, National Association of College Stores, Inc. and The Freedom to Read Foundation (collectively, the "amici"), submit this joint brief, amici curiae, urging reversal of the decision below. The brief is submitted upon the written consents of counsel to both petitioners and respondents, which are submitted herewith.

#### The Amici

The amici's members publish, produce, distribute, and sell books, magazines, and other printed materials of all types, including those which are scholarly, literary, scientific and entertaining. The amici's members do not own what are commonly referred to as "adult" bookstores.

The American Booksellers Association, Inc. (ABA) is the major national association of booksellers in the United States. ABA has approximately 4,000 members consisting of over 6,000 retail outlets. The members include private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. (AAP) is the major national association in the United States of publishers of general books, textbooks and educational materials. Its members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university

presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schools, universities and libraries and through thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities.

The Council for Periodical Distributors Associations is the national trade association for almost four hundred independent local wholesale distributors who distribute over 95% of all magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,850 college stores located throughout the United States.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the right of libraries to include in their collections and make available any work which they may legally acquire; and to set

legal precedent for the freedom to read on behalf of all citizens.

#### Interest of the Amici

The interest of amici reflects their continuing interest in the decisions of this Court involving the balancing of First Amendment rights and restrictions on material with sexual content. Amici's brief will demonstrate how the legal principles involved in this case affect mainstream publishers, distributors and booksellers who publish, distribute and sell popular, literary, scientific, and scholarly books and periodicals that have sexual content but are not obscene.

This case presents the issue whether a bookseller's right to operate his business can be terminated by the state simply because he has once sold a book or magazine that was later declared obscene. In fact, a bookseller may have his license revoked or denied because he once mistakenly displayed a non-obscene work subsequently found to be "harmful to minors."

Bookselling is more than a business. Like the schoolroom, public library, museum and art gallery, the bookstore is a center of discussion and activity vital to a creative literary and political culture. It cannot be that such an enterprise warrants less constitutional protection because some of the works being sold or discussed describe sexual activity or are intended for mature readers. Indeed, the history of literature shows that groundbreaking authors often offend public morals.

Amici are thus deeply troubled that the Dallas "Sexually Oriented Businesses" ordinance applies to virtually all bookstores or video stores.

Amici are also deeply concerned about the trend, reflected in the Dallas ordinance, which would close a bookstore merely because a proprietor mistakenly sells or displays a work later judged to be obscene or harmful to

#### (Continued from previous page)

exchange ideas, and talk about books," and it soon became a literary center of the Transcendentalist and antislavery movements. L. H. Tharp, The Peabody Sisters of Salem 133-147 (1950). London's Poetry Bookshop was founded in 1914 with a lecture room upstairs to hold readings by radical young talents like T. S. Eliot. C. Hassall, Edward Marsh: Patron of the Arts 198-199 (1959). Sylvia Beach founded "Shakespeare and Company" in Paris in 1919 where she promoted the works of the Lost Generation. S. Beach, Shakespeare and Company 23 (1959). During the same period, and until very recently, the Gotham Book Mart served as a popular gathering place for New York authors. Lawrence Ferlinghetti's City Lights Bookstore served this function for the Beat Generation in San Francisco. N. Cherkovski, Ferlinghetti: A Biography 81 (1979). In Chicago, Ben Abramson's Argus Bookshop long dominated the scene as "a sort of a tavern . . ., dispersing conversation instead of the more usual entertainment." V. Starrett, Books and Bipeds 158-159 (1947). In rural settings, creative bookshops have also flourished as centers for local and "summer" writers. See, e.g., M. Hard, A Memory of Vermont: Our Life in the Johnny Appleseed Bookshop 1930-35 (1967).

<sup>&</sup>lt;sup>1</sup> Roman booksellers, in their role as publishers, encouraged many of the empire's greatest writers, and booksellers in 17th and 18th century London were the publishers of Pope, Dryden and Dr. Johnson. R. L. Duffus, Books: Their Place in a Democracy 122-23 (1930). Elizabeth Peabody founded her Boston bookshop in 1840 as "a place where people could meet, (Continued on following page)

minors. Attacks against booksellers, publishers and distributors handling First Amendment protected materials have been increasing. In Alabama, the District Attorney of the City of Montgomery embarked on an unlawful campaign to coerce bookstore and newsstand owners from carrying constitutionally-protected magazines that he deemed objectionable. See Council for Periodical Distributors Association v. Evans, 642 F. Supp. 552 (M.D. Ala. 1986), aff'd in part and vacated in part, 827 F.2d 1483 (11th Cir. 1987).

At the national level, the Attorney General's Commission on Pornography ("Commission") endorsed broad new law enforcement initiatives against obscenity, and encouraged "private" censorship efforts as a "coercive force" to "control" the availability of non-obscene materials with sexual content. Attorney General's Commission on Pornography, Final Report, 421-23 (July 1986). Earlier this term this Court struck down provisions of an Indiana statute allowing the state to padlock the doors of a bookstore merely on an ex parte showing that the store contained two items of purported obscenity. Fort Wayne Books, Inc. v. Indiana, 109 S.Ct. 916 (1989). The federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1951 et seq. (1984) ("RICO") provides similar forfeiture remedies. See United States v. Pryba, 674 F. Supp. 1504 (E.D. Va. 1987), appeal pending, 4th Circuit.

Amici contend that the Dallas ordinance requiring denial or revocation of a license to operate a bookstore based on a sir gle prior misdemeanor conviction operates as an unconstitutional prior restraint, singles out First Amendment protected businesses for regulation and closure, and fails to provide the special procedural safeguards that this Court has consistently imposed with respect to the forfeiture of expressive rights.

#### The Challenged Ordinance

In 1986, the City of Dallas, Texas, enacted Ordinance No. 19196, which amended the Dallas City Code by adding a new Chapter 41, "Sexually Oriented Businesses". Chapter 41, as amended by the City of Dallas by Ordinance No. 19377 on October 12, 1986 (the "Dallas ordinance" or the "ordinance"), institutes a wide-ranging system of zoning and licensing requirements on "sexually oriented businesses."

The definitions of terms used in the ordinance warrant careful scrutiny. "Sexually Oriented Business" is defined to include, among other things, any "adult bookstore" or "adult video store." Dallas City Code, § 41A-2(20). "Adult bookstore" and "adult video store" are defined as follows:

- (1) ADULT BOOKSTORE or ADULT VIDEO STORE means a commercial establishment which as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following:
- (A) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which depict or describe "specified sexual activities" or "specified anatomical areas"; or

(B) instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities."<sup>2</sup>

(18) SPECIFIED ANATOMICAL AREAS means human genitals in a state of sexual arousal.

- (19) SPECIFIED SEXUAL ACTIVITIES means and includes any of the following:
- (A) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;
- (B) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;
  - (C) masturbation, actual or simulated; or
- (D) excretory functions as part of or in connection with any of the activities set forth in (A through (C) above.

§§ 41A-2(1), (18) and (19) (Emphasis supplied.).

The ordinance requires the operator of such a bookstore or newsstand to obtain a city license (§ 41A-4(a)), and pay an annual \$500 fee (§ 41A-6(a)). It also provides that the license may be denied (§ 41A-5(a)), revoked (§ 41A-10(b)(5)), or its renewal denied (§ 41A-8(a)),

because the operator or his spouse has been convicted of any of various offenses, including sale of obscene materials or the sale, distribution, or display of material "harmful to minors" (§ 41A-5(a)(10)(A)(i)). The ordinance expressly provides that "[t]he fact that a conviction is being appealed has no effect on the disqualification" (§ 41A-5(b)).3 For a single misdemeanor conviction, the disqualification lasts for two years from the date of conviction or release from incarceration (§ 41A-5(a)(10)(B)(i)). For two or more misdemeanor convictions occurring within any 24-month period, the disqualification lasts for five years from the last conviction or release from confinement for the last conviction (§ 41A-5(a)(10)(B)(iii)). There is no basis for the lifting of the disqualification other than the passage of these time limits (§ 41A-5(d)).

Section 41A-21(e) provides that "It is a defense to prosecution under Section 41A-4(a) [operating without a license] or Section 41A-13 [zoning restrictions] that each item of descriptive, printed, film, or video material offered for sale or rental, taken as a whole, contains serious literary, artistic, political, or scientific value."

<sup>&</sup>lt;sup>2</sup> As discussed, infra, this definition of adult bookstore and adult video store is far broader than that contained in the ordinance approved in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), because the Dallas ordinance does not require that the expressive materials must be characterized by an emphasis on sex, only that they must contain a description or depiction of sex. It thus probably includes virtually all mainstream bookstores.

<sup>&</sup>lt;sup>3</sup> Taken on its face, that provision appears to mean that a bookseller is disqualified even if a conviction is reversed.

#### **ARGUMENT**

I

THE DALLAS ORDINANCE IMPOSES AN UNCONSTITUTIONAL PRIOR RESTRAINT ON PROTECTED EXPRESSION BY REQUIRING THE DENIAL, REVOCATION OR NON-RENEWAL OF THE LICENSE TO OPERATE A BOOKSTORE SIMPLY BECAUSE THE OPERATOR HAS ONE PRIOR MISDEMEANOR CONVICTION.

The Dallas ordinance requires the denial, revocation or non-renewal of a license to any "Adult Bookstore"4 proprietor who has been convicted (during a period ranging from two to five years) for various offenses, including sale or display of material deemed obscene or "harmful to minors". As the District Court duly noted, "[t]his aspect of the Ordinance is not a content-neutral time, place, and manner restriction on protected speech; denial of a license amounts to an absolute suppression of expression." 648 F. Supp. at 1074 n. 37; cf. 837 F.2d at 1310 (Thornberry, J., dissenting) ("The time at which he may speak, the place where he may speak, and the manner in which he may speak are not merely being regulated; his entire speech is being extinguished."). Yet both the Fifth Circuit and the District Court held this "absolute suppression" of speech permissible simply because the Dallas City Council found a "substantial relationship"

between the operator's conviction and the "crime-control intent of the law". 837 F.2d at 1305; 648 F. Supp. at 1073.5

The denial of a license to operate a bookstore on the basis of a single prior conviction, especially a misdemeanor based on the sale or display of obscene or "harmful to minors" materials, clearly constitutes a prior restraint violative of the First Amendment:

Any system of prior restraint . . . "comes to this Court bearing a heavy presumption against its constitutional validity." . . . The presumption against prior restraints is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. See Speiser v. Randall, 357 U.S. 513 (1958).

<sup>&</sup>lt;sup>4</sup> As discussed, infra, the Dallas ordinance defines "Adult Bookstore" so broadly as to include most mainstream general bookstores.

<sup>5</sup> The District Court relied on Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986), to conclude that "[I]f violation of law by a licensee may permissibly justify closure, it follows inescapably that one who has been convicted of a sex-related crime may be denied licensure." 648 F. Supp. 1073-1074 n. 34. As explained, infra, the conclusion does not inflow. Arcara permitted the closure of the immediate premises of a bookstore in which sex-related crimes had occurred, but expressly conditioned its holding upon the fact that the owner would "remain free to sell the same materials at another location." 478 U.S. at 705. Denial of a license to sell the materials at all would obviously remove that freedom.

6

Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 316 n. 13 (1980) (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-559 (1975)) (emphasis supplied).

In Vance the Court held that a general injunction against the future commercial manufacture, distribution or exhibition of obscene material based on prior offenses is unconstitutional because it authorizes a prior restraint on the exhibition of material before it has been finally determined to be obscene. 445 U.S. at 316. The denial or revocation of a license under the Dallas ordinance is even more egregious, because it operates as an absolute suppression of non-obscene, fully-protected speech as well.

The prior restraint imposed in this case is virtually identical to that struck down by the Court over 50 years ago in Near v. Minnesota, 283 U.S. 697 (1931). The statute in Near authorized "abatement," as a public nuisance, of a "malicious, scandalous and defamatory newspaper." The Court struck down the statute, stating that "the chief purpose" of "the conception of liberty of the press as historically conceived and guaranteed" is "to prevent previous restraints upon publication." 283 U.S. at 713. The Court was mindful that the principle of free speech resulted from struggles against the licensing system in England. Id. Consistently since Near it has been clear that one cannot be deprived of First Amendment rights as a punishment for violating laws regarding speech. See, e.g., City of Paducah v. Investment Entertainment, Inc., 791 F.2d 463 (6th Cir.), cert. denied, 479 U.S. 915 (1986); Gayety Theaters, Inc. v. City of Miami, 719 F.2d 1550 (11th Cir. 1983); Cornflower Entertainment, Inc. v. Salt Lake City Corp., 485 F. Supp. 777 (D. Utah 1980). As stated in Near, "in passing upon constitutional questions the court has regard to substance and not to mere matters of form . . .; in accordance with familiar principles, the statute must be tested by its operation and effect." Near v. Minnesota, 283 U.S. at 708. As further stated in Organization For a Better Austin v. Keefe, a prior restraint exists where "the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature. . . ." 402 U.S. 415, 418-419 (1971).

The plain effect of the denial or revocation of a license to operate a bookstore based on an obscenity conviction is to deprive booksellers of their First Amendment rights.<sup>6</sup> The courts below brushed aside First Amendment analysis merely because the Dallas City

<sup>6 &</sup>quot;Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of the mind of the actor. . . . This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision making, and of mixed motivation." Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring). Here the trial court expressly found that "the public speakers in favor of the Ordinance supported it almost singularly in hopes that it would indeed suppress the speech purveyed by sexually oriented businesses . . . " 648 F. Supp. at 1065. The "most realistic interpretation" of the Dallas City Council's intent "is to expand beyond traditional prosecution of legally obscene materials into restriction of materials that, though constitutionally protected, have the same undesired effect on the community's morals as those that are actually obscene. Fulfillment of that intent would surely overflow the boundaries imposed by the Constitution." Fort Wayne Books, 109 S. Ct. at 938 (Stevens, J., concurring in part and dissenting in part).

Council characterized the prohibited expression as a source of "crime and the downgrading of property values." (Ordinance No. 19196, Recital (9)).7 No such facile recharacterization can alter the fact that the statute's seizure and forfeiture provisions created the substantive harm that prior restraint doctrine aims to prevent - the censorship of material that has not been adjudged obscene or even "harmful to minors". See Fort Wayne Books, 109 S. Ct. at 929. Labelling such expression as a source of "crime and the downgrading of property values" can no more strip away its First Amendment protection than does labelling speech or speakers as "racketeering" or "contraband" (id.); "subordination of women" (American Booksellers Ass'n, Inc. v. Hudnut, 475 U.S. 1001 (1986)); "Communist" (Delonge v. Oregon, 299 U.S. 353 (1937)); anti-semitic (Near v. Minnesota, supra); or

"Nazi" (Collin v. Smith, 578 F.2d 1197 (7th Cir.), cert.denied, 439 U.S. 916 (1978)).

The flaw in the Dallas ordinance is the same as in both Near and Vance v. Universal Amusement Co., 445 U.S. at 311, fn. 3:

In both cases the state made the mistake of prohibiting future conduct after a finding of undesirable present conduct. When that future conduct may be protected by the first amendment, the whole system must fail because the dividing line between protected and unprotected speech may be "dim and uncertain." Bantam Books v. Sullivan [cite omitted]. The separation of these forms of speech calls for "sensitive tools," Speiser v. Randall [cite omitted].

The threat to protected speech is particularly acute because the Dallas ordinance defines "adult bookstore" so broadly: The ordinance applies to any bookstore or video store "which as one of its principal business purposes offers for sale or rental" printed materials which "depict or describe . . . sex acts." Dallas City Code § 41A-2(1). This definition of "Adult Bookstore", which easily includes the vast majority of mainstream bookstores, is far broader than that of the ordinance approved in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). The ordinance here is not limited to bookstores which present "material distinguished or characterized by an emphasis on matter depicting, describing or relating to" se. ects. Id. at 53. Any general bookstore today could be described as having as "one of its principal business purposes" the sale of books and/or magazines which include some description of sexual acts, such as contemporary or classic fiction. Similarly, most video stores offer

<sup>7</sup> The Fifth Circuit reasoned that "the City's findings conform with the well-accepted notion that the government may attach to criminal convictions disabilities aimed at preventing recidivism." 837 F.2d at 1305; citing DeVeau v. Braisted, 363 U.S. 144 (1960). But DeVeau held only that convicted felons could be barred from "certain employments closely touching the public interest, remitting them to executive discretion to have the bar removed." 363 U.S. at 159. Although bookstores are enterprises of great importance to creative culture, the operation of a bookstore is not the type of public or quasi-public charge as the offices or duties (e.g., jury service, military service, government office, trade union office) contemplated in DeVeau. Moreover, an obscenity or "harmful to minors" conviction is a misdemeanor solely involving expression, not a felony or crime "involving official misconduct" like the crimes discussed in DeVeau. Id. Finally, the Dallas ordinance, as amended, does not provide for "executive discretion to have the bar removed." See Ordinance No. 19377, § 41A-5(c).

popular contemporary dramatic videos (many of which themselves depict sex acts).

The constitutionality of the Dallas ordinance is not furthered by its provision for an affirmative defense in Section 41-21(e):

It is a defense to prosecution under Section 41-4(a) [operation without a license] or Section 41-13 [location restrictions] that each item of descriptive, printed, film, or video material offered for sale or rental, taken as a whole, contains serious literary, artistic, political or scientific value.

A similar affirmative defense provision was held unavailing in Near:

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute [is] valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details), and required to produce proof of the truth of his publication, or of what he intended to publish and of his motives, or stand enjoined. If this can be done, the legislature may provide the machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship.

283 J.S. at 721.

It is unconstitutional to require that a bookseller prove that presumptively First Amendment protected materials are of "serious value." See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986); Speiser v. Randall, 357 U.S. 513 (1958). Additionally, the Dallas ordinance's "affirmative defense" provision adopts only one of the three prongs of the obscenity test set forth by the Court in Miller v. California, 413 U.S. 15, 24 (1973). For even if a work lacks "serious value", it is constitutionally protected unless it both depicts or describes specified sexual conduct and, applying contemporary community standards, appeals to the prurient interest. Id. Under the regulatory scheme established by the Dallas ordinance, the owner of a corner newsstand that sells newspapers, comic books and magazines, including a prominent assortment of popular men's magazines, could be prosecuted for operating an "adult bookstore" without a license, and could defend himself only by proving that each comic book had "serious value".

The threat of license denial or revocation also will have an obvious chilling effect on booksellers, frightening them into removing from sale non-obscene books and magazines with any sexual content. See Smith v. California, 361 U.S. 147 (1959). One error in identifying obscenity or materials "harmful to minors" could cost the bookseller his business. As the Court recognizes, "constitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line." Bantam Books v. Sullivan, 372 U.S. 58, 66 (1963). The threshold of First Amendment protection becomes even dimmer when the "harmful to minors" standard of Ginsberg v. New York, 390 U.S. 629 (1968), is at issue, since such material by definition is First Amendment protected and has serious literary, artistic, political, or scientific value. Where a wrong

guess could lead to the forfeiture of the right to operate a business, many speakers will surely "steer far wider of the unlawful zone." Speiser v. Randall, 357 U.S. 513, 526 (1958). The Court has acknowledged that the severity of penalties for offenses involving books and magazines should be tailored to avoid the danger of self-censorship. See New York v. Ferber, 458 U.S. 747, 774 (1982) (severity of penalties must be considered in evaluating the chilling effect of child pornography laws); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (limiting punitive damages in defamation actions). While "[t]he mere assertion of some possible self-censorship . . . is not enough to render an anti-obscenity law unconstitutional," Fort Wayne Books, Inc., 109 S. Ct. at 926, when the penalty is the loss of the right to engage in an expressive business at all, the threat of self-censorship is certain. Indeed, the curtailment of undesired but protected expression was one of the chief purposes sought by the ordinance's principal supporters. See 648 F. Supp. at 1065 n. 11 ("[T]he most vocal supporters of the ordinance . . . applauded the ordinance for its incidental impact on speech.").

Yet, works on the borderline that are likely to be suppressed as a result of self-censorship often carry the seed of new literary development. See Commonwealth v. Friede, 271 Mass. 318, 171 N.E. 472 (1930) (Dreiser's An American Tragedy held obscene); Commonwealth v. Delacey, 271 Mass. 327, 171 N.E. 455 (1930) (Lawrence's Lady Chatterley's Lover held obscene); People v. Dial Press, 182 Misc. 416, 48 N.Y.S.2d 480 (N.Y. Magis. Ct. 1944) (same); People v. Friede, 133 Misc. 611, 233 N.Y.S. 565 (Magis. Ct. 1929) (Radcliffe Hall's The Wellrof Loneliness held obscene); People v. Doubleday & Co., 272 App. Div. 799, 71 N.Y.S. 2d 736,

aff'd 297 N.Y. 687, 77 N.E.2d 6 (1947), aff'd 335 U.S. 848 (1948) (Wilson's Memoirs of Hecate County held obscene); Attorney General v. Book Named "God's Little Acre", 326 Mass. 281, 93 N.E.2d 819 (1950) (Erskine Caldwell's God's Little Acre held obscene); United States v. Two Obscene Books, 99 F. Supp. 760 (N.D. Cal. 1951), aff'd. sub. nom. Besig v. United States, 208 F.2d 142 (9th Cir. 1953) (Henry Miller's Tropic of Cancer and Tropic of Capricorn held obscene); cf. United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1932), aff'd, 72 F.2d 705 (2d Cir. 1934) (James Joyce's Ulysses held not obscene).

The bookseller has often played a critical role in fostering new authors and new literary movements, influencing literary and social taste and provoking political discussion by choosing to stock and promote such works. Licensing booksellers deprives them of the independence they require to act as intellectual gadflies. The Dallas ordinance is "but a step to a complete system of censorship" for all speakers. See Near, 283 U.S. at 721.

<sup>8</sup> E.g., James Joyce's pathbreaking Ulysses was first published and promoted by Paris bookseller Sylvia Beach. S. Beach, Shakespeare and Company 47 (1959). Alan Ginsburg's anthem of the Beat Generation, Howl, was published and defended against obscenity charges by San Francisco bookseller Lawrence Ferlinghetti. N. Cherkovski, Ferlinghetti: A Biography 100-113 (1979); J. W. Erlich, Howl of the Censor (1956). The Gotham Book Mart successfully defended its sale of a limited edition of Andre Gide's Let It Die. People v. Gotham Book Mart, 158 Misc. 240, 285 N.Y.S. 563 (Magis. Ct. 1936).

II

THE DALLAS ORDINANCE SINGLES OUT BUSI-NESSES ENGAGED IN FIRST AMENDMENT PROTECTED ACTIVITIES FOR REGULATION AND CLOSURE THROUGH THE DENIAL OR REVOCATION OF A LICENSE.

The Dallas ordinance unconstitutionally makes bookstores bear the burden of controlling crime and urban blight. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Grosjean v. American Press Co., Inc., 297 U.S. 233 (1936). As discussed, supra, the ordinance defines "Adult Bookstore" so broadly as to include almost all general bookstores, requiring almost every bookseller in Dallas to apply for a license to operate his or her business. Such differential treatment of the entire bookselling trade cannot withstand First Amendment scrutiny unless the government "asserts a counterbalancing interest of compelling importance that it cannot achieve without differential" treatment, and has no "alternative means of achieving" its purposes. Minneapolis Star, 460 U.S. at 585-586. Here the City Council's purported purpose - the control of crime and resulting urban blight - can be accomplished by alternative means: the City can simply prosecute the criminal acts it wishes to control. An ordinance which singles out First Amendment protected activity for regulation is even more egregious if it is intended to suppress expression. Id., 460 U.S. at 585. Here, the District Court found that the ordinance's principal supporters had precisely that purpose. 648 F. Supp. at 1065.

Even as applied to the more commonly understood class of "adult bookstores" - bookstores specializing in

materials which emphasize sexuality – the ordinance is unconstitutional because it allows for the denial or revocation of a license on the basis of a single prior conviction for offenses including obscenity and "harmful to minors" misdemeanors. Both courts below incorrectly applied prior decisions of this Court relating to zoning ordinances to conclude that the denial or revocation of a license for a prior conviction is permissible. The District Court relied on Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986):

Arcara... held that a sexually related business could be closed when management was aware of sexual behavior on the premises, in violation of law. See id. at 5062. If violation of law by a licensee may permissibly justify closure, it follows inescapably that one who has been convicted of a sex-related crime may be denied licensure.

648 F. Supp. at 1073-74 n.34.

The Court of Appeals applied the test of City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), and concluded that the crimes resulting in denial or revocation of a license were substantially related to "the kinds of criminal activity associated with sexually oriented businesses," and that the ordinance is "well tailored sufficiently to meet its ends." 837 F.2d at 1305.

The courts below misunderstood Renton and Arcara. Renton involved a zoning ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or school. The Court found that the ordinance was properly described as a time, place and manner regulation aimed not at the content of the adult films

shown at the theaters "but rather at the secondary effects of such theaters on the surrounding community." 475 U.S. at 47 (original emphasis). The Court reviewed the ordinance under a two-fold test, requiring that it "serve a substantial government interest and allow[] for reasonable alternative avenues of communication." 475 U.S. at 50. The Court upheld the ordinance only because it was "'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects," and allowed reasonable alternative avenues of communication. 475 U.S. at 50, 52-53.

Arcara involved an adult bookstore which had been closed under a New York statute allowing closure of a building used as a place for prostitution and lewdness. The Court upheld the closure on the grounds that the precipitating offenses of prostitution and lewdness "manifest absolutely no element of protected expression," and because the bookstore operators "remain free to sell the same materials at another location." 478 U.S. at 705. Concurring, Justice O'Connor, joined by Justice Stevens, cautioned that "[i]f . . . a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books or because of the perceived secondary effects of having such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." 478 U.S. at 708 (O'Connor, J., joined by Stevens, J., concurring).

Applying these decisions it is clear that the denial or revocation of a license to operate a bookstore based on a prior obscenity conviction is unconstitutional. First, as both courts recognized below, "[t]his part of the Ordinance does not simply regulate the manner of protected activity, it denies the right of persons convicted of certain crimes to engage in the regulated businesses." 837 F.2d at 1304; see also 648 F. Supp. at 1074 n. 37. Both Renton and Arcara mandate that a bookstore operator be left "free to carry on his bookselling business at another location, even if such locations are hard to find." Arcara, 478 U.S. at 705 n.2; Renton, 475 U.S. at 54; see also American Mini Theatres, 427 U.S. at 71 n. 35. Because the denial or revocation of a license eliminates that freedom, it fails the tests of Arcara and Renton. See Organization for a Better Austin v. O'Keefe, 402 U.S. 415 (1971) (a broad content-neutral restraint on all future speech, trig, ered by a past unprotected speech offense, is just as unlawful as a content-based restraint aimed only at future speech).

Furthermore, unlike public lewdness or prostitution, a possibly obscene work obviously "manifests [an] element of protected expression." Arcara, 478 U.S. at 705. Hence, when denial or revocation of a license is based on an obscenity conviction it must pass the more difficult test of United States v. O'Brien, 391 U.S. 367 (1968). Under this test, the ordinance "is sufficiently justified if it is within constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377.

The denial or revocation of a license based on an obscenity conviction fails the last two elements of the

O'Brien test. Where a conviction for obscenity is the basis for closing down the bookstore, it cannot be said that "the government interest is unrelated to the suppression of free expression." The apparent reason for the inclusion of obscenity among the disqualifying crimes is that the City Council of Dallas feared that a prior obscenity conviction raises the likelihood that an operator will sell obscene materials in the future. Whatever social ills may supposedly derive from obscenity, the Dallas City Council's interest in suppressing obscenity is an interest in suppressing expression because of its content.

The ordinance also fails because it applies a far greater restriction on expression than is necessary to further its interests in controlling crime and urban blight. The ordinance zoning, disclosure and inspection provisions are sufficient to meet those interests. If repeated obscenity offenses occur, they can be prosecuted. But it is unnecessary and unwise to control obscenity by preventing a bookseller from selling non-obscene material with sexual content.

#### III

THE DALLAS ORDINANCE LACKS ANY OF THE PROCEDURAL SAFEGUARDS REQUIRED WHEN PRESUMPTIVELY FIRST AMENDMENT PROTECTED EXPRESSION IS SUPPRESSED.

The Dallas ordinance is also unconstitutional and its provisions for denial or revocation of a license should be invalidated for failure to comply with the Court's prior rulings imposing procedural safeguards when First Amendment protected expression is infringed. "The settled rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.' "Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975) (quoting Freedman v. Maryland, 380 U.S. 51 (1965)). Freedman set forth three safeguards which a system of prior restraint must provide if it is to pass First Amendment scrutiny:

First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975) (emphasis supplied).

The Dallas ordinance fails to meet any of these tests. If a license is revoked or denied, the ordinance provides for administrative review. But it imposes upon the bookstore operator the burden of seeking judicial review and of proving the invalidity of the challenged ruling. There is no specified brief period during which the judicial review must occur, and hence the would-be bookseller can be denied a license for an indefinitely long period of time. Finally, there is no provision ensuring a prompt final judicial review.

<sup>&</sup>lt;sup>9</sup> As explained, supra, the ordinance also places upon the bookstore owner the burden of proving that all books in his store have serious value if he is prosecuted for operating without a license.

The Fifth Circuit held that Freedman's safeguards need not apply because it is a speech business which would be suppressed. But the decisions of this Court make clear that a bookseller is more than a businessman, and that the public has an interest in a strong and independent bookseiling community. See, e.g., Smith v. California, 361 U.S. 147 (1959).

#### CONCLUSION

For the reasons set forth above, we respectfully urge the Court to find the Dallas ordinance unconstitutional and reverse the order under review.

April 12, 1989

Respectfully submitted,

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# AMICUS CURIAE

BRIEF

Nos. 87-2012, 87-2051, and 84

Buprent Court, U.S.
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Supreme Court of the United States

October Term, 1988

NO. 87-2012 FW/PBS, INC., et al., Petitioners,

CITY OF DALLAS, TEXAS, et al., Respondents.

> NO. 87-2051 M.J.R., INC., et al., Petitioners,

CITY OF DALIAS, TEXAS, et al., Respondents.

NO, 88-49
CALVIN BERRY, III, et al.,
Petitioners,

CITY OF DALLAS, TEXAS, et al., Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE CHILDREN'S LEGAL FOUNDATION

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#### MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Children's Legal Foundation, Inc.
(CLF), respectfully moves for leave to
file the attached brief amicus curiae.
The consent of the attorney for
Respondents has been obtained. The
consent of the attorney for Petitioner
was requested telephonically. He failed
to respond, so it is assumed that
consent is refused.

The interest of the amicus curiae is set out below.

Respectfully submitted,

BENJAMIN W. BULL Counsel for Children's

Legal Foundation

2845 E. Camelback Road Suite 740 Phoenix, AZ 85016 (602) 381-1322

#### INTEREST OF AMICUS CURIAE

Children's Legal Foundation, Inc., formerly Citizens for Decency through Law, Inc., is a non-profit legal organization founded in 1957 by attorney Charles H Keating, Jr. Mr. Keating was a member of the 1970 Presidential Commission on Obscenity and Pornography. CLF exists to assist public officials in drafting the enforcement and constitutional obscenity and pornography laws. It also provides legal assistance to cities and counties seeking eradicate the "secondary effects" of sexually oriented businesses through zoning ordinances. CLF also provides public information on legal and social issues related to pornography. CLF has a legal staff of attorneys practicing exclusively in the First Amendment area.

of the challenged Dallas ordinance, and have drafted numerous other similar ordinances. CLF has filed more than 50 briefs in the United States Supreme Court and has participated in trials and appeals in more than 40 states. It has more than 120 affiliated chapters across the nation representing over 100,000 supporters.

profoundly concerned about the ability of communities to regulate illegal conduct and public health hazards created by sexually oriented businesses. It believes that the Dallas ordinance is a constitutional method of combatting these problems, and is necessary to the maintenance of a society where families and children are safe to walk the streets of their cities.

#### I. INTRODUCTION

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A strong First Amendment is perhaps our nation's most vital guarantor of continued liberty. Any legislative incursion into freedom of speech must therefore be closely scrutinized. Nevertheless, the mere invocation of the terms "prior restraint" and "free speech violation" should not settle the issue. This Court must first determine whether speech rights are truly at stake.

Petitioners would like this Court to focus exclusively on the important and grand principles of the First Amendment. Amicus Curiae CLF respectfully suggests that this Court would be better served in directing its attention to the cold, hard, sordid facts relevant to this case. Those facts relate to the harmful secondary effects flowing from the illegal conduct occurring on the premises of sexually

oriented businesses. This type of ordinance is directed at those effects, and not at speech.

The truth is that these sexually oriented establishments are not in the business of communicating ideas, they are in the business of communicating diseases to the community. Their owners do not care about free speech, but about fast cash. They are in the business of catering to the base sexual gratifications of others, for profit. That desire for immediate gratification is what leads "customers" of sexually oriented businesses to engage dubious, often illegal behavior on the premises.

CLF requests that this Court take a few moments to review the Appendices to this brief, which are transcriptions of videotapes relating to the interior of these establishments. These videotapes

graphically depict the "atmosphere" of a typical sexually oriented business: the male and female prostitutes turning tricks 24 hours per day; the overpowering smell of bodily fluids; the semen, urine and feces on the floors and walls; the anonymous sexual activity occuring through holes in the wall, etc. That is what this case is truly about. For the sake of the community's health, morals, safety and general welfare, these breeding grounds for the transmission of sexual diseases must be closely regulated.

BUSINESS LICENSE REQUIREMENT DOES NOT IMPOSE AN UNCONSTITUTIONAL PRIOR RESTRAINT ON PROTECTED EXPRESSION BY PROVIDING FOR DENIAL OR REVOCATION OF A LICENSE ON THE BASIS OF CERTAIN PRIOR CRIMINAL CONVICTIONS.

Petitioners assert that the provisions of the Ordinance allowing denial of a license to a person with

certain specified convictions act as an unconstitutional restraint on expression. This contention is without merit.

There is clearly no constitutional impediment to requiring sexually oriented businesses to obtain licenses. 

The Ordinance denies licenses to persons convicted of certain crimes that are related to the crime-control intent of

Young v. American Mini Theatres, 427 U.S. 50, 62 (1976) ("The mere fact that the commercial exploitation of material protected by the Amendment is subject to . . . licensing requirements is not sufficient reason for invalidating these ordinances"); Shuttlesworth v. City of Birmingham, 394 U.S. 147 150-51 (1969); Tyson & Brother - United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 430 (1927) ("The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power ..."). See also Genusa v. City of Peoria, 619 F.2d 1203, 1212-13 (7th Cir. 1980) (court relied on Young v. American Mini Theatres to uphold license requirement for operation of adult bookstores).

the law. 2 Individuals convicted of misdemeanors become eligible for a license two years after conviction or end of confinement, whichever is later; and for felonies or multiple misdemeanors the period is five years.

FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1305 n.23 (5th Cir. 1988); Dumas v. City of Dallas, 648 F.Supp. 1061 (N.D. Tex. 1986). Petitioners argue that this licensing requirement acts as an unconstitutional prior restraint on the expressive activities of those

These are prostitution, obscenity, sale, distribution, or display of harmful material to a minor, sexual performance by a child, possession of child pornography, public lewdness, indecent exposure, indecency with a child, sexual assault, aggravated sexual assault, incest, solicitation of a child, and harboring a runaway child. FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1304 n.19 (5th Cir. 1988); Dumas v. City of Dallas, 648 F.Supp. 1061, 1082 (N.D. Tex. 1986).

denied a license for past criminal behavior. This argument is utterly without merit.

A. The License Requirement is Content-Neutral and Bears a Substantial Relationship to the Purpose of the Ordinance.

Like the Renton ordinance in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), the Dallas Ordinance The Dallas content-neutral. City Council adopted the Ordinance after making a number of factual findings. It found that crime rates are 90% higher in adult districts. The Council concluded that safety required regulation of sexually oriented businesses because they "are frequently used for unlawful activities, including sexual prostitution and sexual liaisons of a casual nature," and because there had been a substantial number of arrests for sex-related crimes these

businesses. They also found convincing evidence that these businesses cause "urban blight" and decreased property values. FW/PBS, 837 F.2d at 1301. Indeed the Ordinance recites that its purpose is to "promote health, safety and morals," and to prevent the "continued concentration of sexually oriented businesses." It disclaims any purpose to deny "access by adults to sexually oriented materials protected by the First Amendment." The City also considered studies of other cities regarding the relationship among concentrations of sexually oriented businesses, crime, and property values. In order to prevent increased crime, blighting, and declining property values, the Ordinance was enacted. at 300.

Thus, it is content-neutral in the same way as the Detroit ordinance in

Young v. American Mini Theatres, supra, and the Renton ordinance in City of Renton. These two cases recognize that a city may regulate the effects of sexually oriented businesses without engaging in content-based regulation. They also hold that sexually explicit materials enjoy less First Amendment protection than other kinds of speech. City of Renton, 475 U.S. at 49 n.2, quoting American Mini Theatres, 427 U.S. at 70 (sexually explicit speech is afforded the lowest rung of First Amendment protection). 3 And because

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This is consistent with other related cases. Patently offensive references to sexual organs and activities "surely lie at the periphery of First Amendment concern." FCC v. Pacifica Foundation, 438 U.S. 726, 743 (1978); and see Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). More recently, the Court in Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 758-9, n.5 (1985), observed (Footnote Continued)

the Ordinance, like the City of Renton ordinance, regulates only the "secondary sexually effects" of oriented businesses, it need only meet the standards applicable to time, place, and manner restrictions. It need not comply with more stringent limits on regulation aimed at content of speech such as those discussed in Freedman v. Maryland, 380 U.S. 51 (1965). Like the ordinance in City of Renton, this Court requires only that the Dallas Ordinance be "designed to serve a substantial governmental interest" and allow for "reasonable alternative avenues of communication." City of Renton, 475 U.S. at 50.

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<sup>(</sup>Footnote Continued)
that, "We have long recognized that not
all speech is of equal First Amendment
importance . . . [c]ertain kinds of
speech are less central to the interest
of the First Amendment than others..."

Since this Court did not grant a writ of certiorari on the question of Ordinance provides whether the "reasonable alternative avenues of communication," the issue before this Court is whether the licensing scheme is "designed to serve a substantial It clearly governmental interest." Like the City of Renton ordinance, the Dallas Ordinance is designed to serve the City's interest in maintaining "the quality of urban life." Id. at 50. This interest is advanced even though the licensing scheme may regulate aspects of the businesses' operations other than location. kind of speech affected by the Renton license requirement and the city's justification for enforcing it are the same as for the Dallas Ordinance's locational zoning rules. Whether a license is denied because the business

the Ordinance, Jike the City of Marco

is improperly located or because the business is improperly maintained, the effect is the same -- the operator must refrain from the activity. His only alternative is to comply with ordinance and obtain a license. Genusa v. City of Peoria, 619 F.2d 1203, 1212 (7th Cir. 1980) (licensing requirements are to be treated under the same analysis as zoning); Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1060 and 1060 n. 5 (licensing requirement content-neutral nude dancing ordinance tested under "time, place, and manner" analysis). Indeed, the "time, place, and manner" doctrine has never been limited to regulation of "place." FW/PBS, Inc., 837 F.2d at 1304.

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The City's findings amply demonstrated a compelling interest in limiting the involvement of specified convicted persons in the operation of

documented the strong relationship between sexually-oriented businesses and sexually related crimes. And the City established a compelling justification for barring those prone to such crimes from the management of these businesses.

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Moreover, the City's findings are supported by the accepted rule that the government may attach to criminal convictions disabilities aimed preventing recidivism. See De Veau v. Braisted, 363 U.S. 144, 158-59 (1960) (plurality opinion) ("Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas."); 106 Forsyth Corp. v. Bishop, 482 F.2d 280, 281 (5th Cir. 1973) (per curiam) (holding that First Amendment permits revocation of theatre license for violation of law against

sexually explicit screenings), cert. denied, 422 U.S. 1044 (1975). Indeed the Supreme Court's recent decision in Fort Wayne Books, Inc. v. Indiana, U.S. , 103 L.Ed.2d 34, 109 S.Ct. 916 (1989), reaffirmed this doctrine emphatically. There the Court upheld closure, and forfeiture to the state, of an entire bookstore as punishment for an obscenity conviction. The Court rejected an argument similar Petitioners' -- that closure of sexually oriented business as punishment for an obscenity RICO conviction was an unconstitutional prior restraint. Court held that the restraint protected presumptively speech activities was not an unconstitutional prior restraint. And see discussion FW/PBS, Inc., 837 F.2d at 1305 (occupational limitations frequently follow criminal conviction, and

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include First Amendment activities such as labor organizing).

The license ineligibility resulting from certain convictions is clearly suitably tailored to achieve the stated purpose of the Ordinance. Ineligibility results only from offenses that are related to the kinds of criminal activity associated with sexually oriented businesses.

B. As a Content-Neutral Regulation, the License Scheme Does Not Result in an Unconstitutional Prior Restraint.

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The district court scrutinized the list of crimes that would make an applicant ineligible for a license and invalidated those it found to have no relationship to the purpose of the Ordinance. These offenses include kidnapping, robbery, bribery, controlled substances violations, and "organized criminal activities." Dumas, 648 F.Supp. at 1074.

Where, as in the instant case, the purpose of the license restriction is unrelated to the incidental prohibition on expressive conduct, no unconstitutional prior restraint occurs. Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986), is squarely on point. There the Court held that a sexually related business could be closed when management was aware of sexual behavior on the premises, in violation of law. Id. at 702. As in the instant case, the criminal conduct was prostitution. The Court made clear that where the purpose of the statute is unrelated to the suppression of speech (i.e., the incidental content-neutral), restraint on expressive conduct is not unconstitutional. And see Commonwealth v. Croaton Books, 323 S.E.2d 86, 89 (Va. 1984) (upheld closure of sexually oriented business based on evidence of

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illegal homosexual activity on the premises). If violation of law by a licensee may permissibly justify closure, it follows inescapably that one who has been convicted of a sex-related crime may be denied a license. See 106 Forsyth Corp. v. Bishop, 482 F.2d 280, 281 (5th Cir. 1973), cert. denied, 422 U.S. 1044 (1975); Barrago v. City of Louisville, 456 F.Supp. 30, 32 (W.D. Ky. 1978); Airport Bookstore, Inc. v. Jackson, 248 S.E.2d 623 (Ga. 1978), cert. denied sub. nom. Gateway Books v. Jackson, 441 U.S. 952 (1979) One intent of the Ordinance is to prevent crime; its purpose is not to suppress speech. Incidental impact on expressive conduct is not an unconstitutional prior restraint. Arcara, supra.

Indeed, merely alleging as Petitioner does that something is an unconstitutional prior restraint on free

speech does not advance this Court's inquiry in any meaningful way. As this Court stated in <u>Kingsley Books v. Brown</u>, 354 U.S. 436, 441-42 (1957):

"The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: 'What is needed,' writes Professor Paul A. Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to particularistic analysis.' The Supreme Court and Civil Liberties, 4 Vand.L.Rev. 533, 539."

Analyzing the instant case in this way, as suggested by the Court in Kingsley Books, is useful. If a bookseller, having fallen behind on his property taxes, loses his business license and is

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forced to close his store, it is absurd for him to complain that the city has imposed an unlawful prior restraint upon his bookselling activities. If bookseller is convicted of the crime of distributing obscene materials, child pornography, or prostitution, he may be imprisoned. But it is absurd for him to argue that his incarceration constitutes a prior restraint on his ability to disseminate protected speech, even though his speech is quite clearly restrained by his inability to operate the bookstore. The same is true in the instant case because the restraint on expressive activities is incidental to, and not the purpose of, the Ordinance. And see Arcara, supra

Contrasting Near 7. Minnesota, 283
U.S. 697 (1931), relied on by
Petitioners, with the instant statute is
instructive. The State of Minnesota had

commenced a statutory nuisance abatement action against Near and his newspaper, alleging it to be "malicious, scandalous and defamatory." After a trial, the district court found that the defendants did regularly publish a malicious, scandalous and defamatory newspaper, and that such newspaper was therefore subject to abatement as a nuisance. The court also perpetually enjoined defendants "from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is malicious, scandalous or defamatory newspaper, as defined by law." Id. at 706. The Supreme Court held, of course, that such an injunction constituted an impermissible prior restraint. Court placed great emphasis on the fact that the object of the Minnesota statute

was to suppress the offending newspaper and to censor the offending publisher.

There are a number of distinctions between the Near case and the instant case, not the least of which is that Near dealt with speech critical public officials rather than speech of a nature.5 sexually explicit significantly, however, the Near injunction, as well as the injunction in Vance v. Universal Amusement Co., 445 U.S. 308 (1980), was based on the content of the publication. In the case of license revocation for conviction of a crime or non-payment of taxes, or imprisonment for conviction of a crime,

Sexually explicit speech is afforded the lowest rung of First Amendment protection. City of Renton, 475 U.S. at 49 n.2; Young v. American Mini Theatres, 427 U.S. at 70. Political speech is on the highest rung. NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).

the incidental restraint on future expression is not based on the content of that expression.

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content. The essence of this forbidden censorship content control. Any restriction on expressive activity because of would content completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open."

The typical prior restraint case deals with the government's effort to censor future expression based on its content. See, e.g., Nebraska Press Ass'n v. Stewart, 427 U.S. 539 (1976); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Freedman v. Maryland, 380 U.S. 51 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

Police Dept., of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972), quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). (Emphasis added, citations omitted.) The Ordinance, including the licensing regulation, is a time, place, and manner statute which is content-neutral. Its purpose is not content control but the elimination of crime, blight, and reduction of property values, which are the secondary effects of sexually oriented businesses. focus of the statutory measure is on elimination of the secondary effects, unrelated to the content of the sexually explicit speech sold in the businesses. And like closure incidentally resulting from an illegal activity on the premises -- such as prostitution (Arcara, supra) -- the denial of a license to operate because of that conviction is not an unconstitutional prior restraint. Its

purpose is not to suppress speech but to prevent increased criminal behavior in and around sexually oriented businesses.

See, e.g., State ex rel. Kidwell v. U.S.

Marketing, Inc., 631 P.2d 622 (Idaho 1981), jurisdiction noted 454 U.S. 1140 (1982), appeal dismissed by Appellant U.S. Marketing, Inc., 455 U.S. 1009 (1982).

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BUSINESS LICENSE ORDINANCE DOES NOT UNCONSTITUTIONALLY SINGLE OUT PERSONS AND BUSINESSES ENGAGED IN FIRST AMENDMENT ACTIVITIES FOR REGULATION CONTRARY TO ARCARA V. CLOUD BOOKS

Petitioners argue that because the Ordinance, especially its license provisions, singles out sexually oriented businesses, it is unconstitutional under the First Amendment. Petitioners primarily rely on their own characterization of Justice O'Connor's concurring opinion in Arcara

v. Cloud Books, Inc., supra.

Petitioners' argument is utterly without merit.

This Court has categorically resolved this issue against Petitioner. In Young v. American Mini Theatres, supra, the Court considered whether a classification based on the sexually explicit content of material sold at a certain location passed constitutional muster as a content-neutral time, place, and manner regulation.

"The principle question presented by this case is whether that statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment."

427 U.S. at 52. The Court upheld the classification based upon sexually explicit but protected speech. The Court ruled that "[r]easonable regulations of the time, place, and manner of protected speech, where those

regulations are necessary to further significant governmental interest, are permitted by the First Amendment." Id. at 63 n.18. In specifically addressing content-based licensing, the Court stated:

"The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and licensing requirements is not a sufficient reason for invalidating these ordinances."

Id. at 62 (emphasis added). The Court specifically held that the content of sexually explicit material could be the basis for separate classification and

The Court cited Kovacs v. Cooper, 336 U.S. 77 (1948) (limitation on use of sound trucks); Cox v. Louisiana, 379 U.S. 559 (1965) (ban on demonstrations in or near a courthouse with the intent to obstruct justice); Grayned v. City of Rockford, 408 U.S. 104 (1972) (ban on willful making, on grounds adjacent to a school, of any noise which disturbs the good order of the school session).

treatment under a licensing and zoning statute.

"Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."

## Id. at 70-71.

"[E]ven though the determination of whether a particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures."

## Id. at 71.

In <u>City of Renton</u>, <u>supra</u>, the Court reaffirmed its holding in <u>Young</u>, ruling that a classification based upon the content of sexually explicit material does not violate the Equal Protection Clause. 475 U.S. at 55, n.4. The Court held that this type of classification is

a valid content-neutral time, place, and manner regulation because it serves a substantial governmental interest and is "justified without reference to the content of the regulated speech." Id. at 48, quoting Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

Lower courts have followed Supreme Court in upholding licensing of commercial establishments dealing in sexually oriented material. For example, Genusa v. City of Peoria, 619 F.2d 1203, 1212 (7th Cir. 1980), upheld a Peoria license ordinance making "it unlawful for anyone to operate an adult bookstore in Peoria without obtaining a license." Under a constitutional challenge similar to the instant case, the Seventh-Circuit held that "under Young v. American Mini Theatres, Inc., supra, 427 U.S.

62-63, 96 S.Ct. at 2448, the requirement of a license is also constitutional."

It is rationally related to the goal of "inverse," or scatter zoning of adult uses; it provides both a method for authorities to enforce scatter zoning and means of assuring those who seek to open a new adult use of the legality of the proposed site.

Id. Similarly see Wall Distributors,
Inc. v. City of Newport News, 782 F.2d
1165, 1171 (4th Cir. 1986); SDJ, Inc. v.
City of Houston, 636 F.Supp. 1359, 1368
(N.D. Tex. 1986), aff'd 837 F.2d 1268
(5th Cir. 1988); O'Day v. King County,
749 P.2d 142 (Wash. 1988); Schope v.
State, 647 S.W.2d 675 (Tex.Civ.App.
1982); Airport Bookstore, Inc v.
Jackson, 248 S.Ed.2d 623 (Ga. 1978).

Finally, contrary to the contention of Petitioners, the fact that an ordinance applies to businesses of a particular type does not make it a content-based regulation, as this Court

ordinance is a valid legislative decision by the City to treat sexually oriented businesses differently because they have "markedly different effects upon their surroundings." Young, 427 U.S. at 82, n.6 (Powell, J., concurring).

THE ORDINANCE PROVIDES ADEQUATE PROCEDURAL SAFEGUARDS AND IS CONSISTENT WITH THIS COURT'S DECISIONS

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Petitioners argue that the Ordinance's procedural safeguards are inadequate to prevent the licensing requirements from acting as a prior restraint. This argument is without merit.

Petitioners contend that the Ordinance is governed by and fails to meet the standards of Freedman v.

Maryland, 380 U.S. 51 (1965). However,

Petitioners' assertion misses the mark

because the Freedman standard does not apply to a content-neutral statute such as the Dallas Ordinance. FW/PBS v. Ci+ of Dallas, 837 F.2d at 1303; Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1060 (9th Cir. 1986); Bayside Enterprises, Inc. v. Carson, 470 F.Supp. 1140, 1149 (M.D. Fla. 1979). As noted by the court below, after the City of Renton decision, a content-neutral ordinance which regulates the effects of sexually oriented businesses without engaging in content-based regulation ". . . need only meet the standards applicable to time, place, and manner restrictions and need not comply with Freedman's more stringent limits on regulation aimed at content." FW/PBS, 837 F.2d at 1303.

As discussed previously, First Amendment protection for nonpornographic expression is greater than that afforded sexually explicit speech. City of

Renton, supra; Young, supra. Further, the actual issue here is the effect sexually oriented businesses have on their surroundings, not the content of the sexually explicit speech itself. This is contrasted with Freedman where the only issue was the explicit content of a particular film. What is being addressed here is not a particular movie; rather, it is the detrimental impact on surroundings caused by long-term sexually oriented commercial businesses.

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The cases cited by Petitioners in support of their Freedman argument are easily distinguishable. Each of them involves content-based regulations whose only purpose was suppression of speech. The regulations involved in City of Paducah v. Investment Entertainment, 791 F.2d 463 (6th Cir. 1986), cert. denied 93 L.Ed.2d 290 (1986), and Entertainment

Concepts, Inc. v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), cert. denied 450 U.S. 919 (1981), were local obscenity ordinances that called upon a city board to review particular films and make administrative findings of obscenity. In Freedman, the Maryland statute at issue actually required the films to be licensed, and directed the Board of Censors to deny licensure to films deemed "obscene, or such as tended, in the judgment of the Board, to debase or corrupt morals . . . " Freedman v. Maryland, 380 U.S. at 52, n.2. Dallas Ordinance is not a content-based statute, but is content-neutral and is designed to curb the harmful secondary commercial effects of certain businesses. It is not concerned with the content of expression itself.

Finally, even if this Court should find that the Freedman standard does

apply to content-neutral, time, place, and manner ordinances, the Dallas statutory scheme satisfies <a href="Freedman">Freedman</a>. As the District Court below held:

"The appeal, revocation, and suspension provisions are replete with procedural protections and reviewable standards, and comport with Freedman and fundamental tenets of due process."

Dumas v. City of Dallas, 648 F.Supp. at 1075.

## V. CONCLUSION

For the foregoing reasons, this Court should uphold the Dallas Ordinance licensing provisions in their entirety.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Amicus Curiae Children's Legal Foundation have been sent by U.S. Mail, Postage Prepaid, on this 20 day of July, 1989, to:

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APPENDIX A

TRANSCRIPTION OF VIDEOTAPE RELATING TO THE INTERIOR OF SEXUALLY ORIENTED BUSINESSES WITH ALAN SEARS, EXECUTIVE DIRECTOR OF CHILDREN'S LEGAL FOUNDATION AND DET. VINCENT RIZZITELLO, OF THE FT. LAUDERDALE POLICE DEPARTMENT, ORGANIZED CRIME DIVISION. (A copy of this video tape has been lodged with the Clerk of Court.)

Mr. Sears: We have a film that you brought from Florida with us today that we would like to take a quick look at. Vince, I would like you to tell the officers who are listening to this tape, I know there is a real different level of experience between those that are watching this tape, between those who have been deeply involved and who have briefly been involved. I would like you to tell us a little about what goes on in these porn outlets.

Det. Rizzitello: Basically, several years ago in one of our investigations, we got a court order to go inside one of

our adult bookstores and video the inside because we could not get a judge to go down and see it for himself so we wanted to represent to him exactly what the atmosphere was like.

What you are seeing now is the back room where the videos are played and the 8 mm movies and this is a marquee section. Basically, it shows films that are offered for viewing in each booth and the customer would go in, you can see there is about 150 films there, decide what film he wanted to view and then go to that particular numbered booth and drop his quarter so he could view about 2 minutes of that film.

Mr. Sears: Now, you have a lot of light in here for your television film. What is the normal situation in these back rooms.

Det. Rizzitello: The way that area was lit up was basically because of our camera that we had. Normally it is a black light atmosphere and you basically have to feel your way around this area. Again, these people knew we were coming so the patrons were removed and it is very sanitary right now. I wish I could bottle the smell or the feeling when you walk in there -- there is just no way of representing it on a piece of tape like this. That is why we wanted the judge to experience it but second best, we got a piece of film that we could have the judge look at and try to interpret it to him basically what these areas are. That they are really masturbation parlors.

Mr. Sears: And in addition to masturbation, other types of sexual activities take place.

Det. Rizzitello: Absolutely, these are the booth's doors, so once you leave the marquee, the patron would find a particular booth he was interested in.

Mr. Sears: This looks like a pretty good size place. What have we got 25 or 26 booths?

Det. Rizzitello: This has 50 booths. This is just one side of it. These booths on this side are mainly smaller booths where maybe one or two people could get in together and on the other side was called the group booths where you get 5 or 6 people. Right now you are looking at a long hallway shot. Normally, this is crowded with individuals going from one booth to the next booth.

Mr. Sears: What is this we are looking at now?

Det. Rizzitello: You are looking at the screen. This is the screen when the customer goes in, he closes the door and the film is shown on the screen. The stains you see on the wall are semen stains, there is no doubt. This is what people do, they go in there and watch a sexually explicit film, they masturbate or they participate in sex with someone else. That is exactly what they are for. These are not for connoisseurs of adult-type films who go in and critique them. This is raw sex.

Mr. Sears: What is this you are pointing to, this writing on the wall?

Det. Rizzitello: This is a normal technique used for advertising for

people to advertise their particular perversion hoping someone will respond. Again, the stains on the wall are the evidence itself on what actually occurs in these booths. The owners will claim that all that occurs is movie viewing, but they are cesspools.

#### APPENDIX B

Newscenter 13

Bau Claire, Wisconsin

(A copy of this video tape has been lodged with the Clerk of Court.)

Reporter: Tonight on "AIDS In A Small Town" we continue to tell you the story of a man we call Rick. Tonight the story is of a man spreading a virus.

Rick: I will never tell anyone what I have. That is kind of stupid.

Reporter: Why is that?

Rick: It kills your sex life.

Reporter: We ave introduced to you a man we are calling Rick. Rick is homosexual, he lives in Eau Claire, and he carries the AIDS virus. What we haven't told you yet is that he claims

anonymous sex with other men. Does that bother you at all that you are spreading the disease?

Rick: No, I look at it as to the point that in riding in a car. If you get into a car with somebody and there is a seatbelt available to you and you don't use it and you get killed, whose fault is it? To a point I feel a little guilty but I always have condoms and if no one wants to use them or no one suggests it then hey, whose fault is it?

. . .

Harlan Heinz, Psychologist: It is not much different from the killer, the person who goes around murdering people without a conscience. I think that is a similar kind of lack of character

development. I think that that is an exception. Some people who feel that they are going to die in a few years would have this attitude. But I think that's few, I think that's an exception and it is a person without a conscience or without any kind of feeling for the welfare of mankind.

. . .

Dr. Michael Finkel: Anyone who continues to behave irresponsibly in such matters should have some sort of penalty. There should be some way that we can stop these people.

. . .

Dr. Ken Alder: This is really distressing. I think that a person who does these things is very definitely a risk to other peoples' health.

Harlan Heinz, Psychologist: It is very difficult to treat a person like this and I think that basically you would not be able to cure this person. This mind would be very difficult to reach.

Reporter: Right now, Wisconsin has no law specifically against the spreading of AIDS. But there could be a law coming very soon.

Gov. Tommy Thompson: I don't know if we want to classify it as a felony but I am certainly looking at some sort of criminal sanctions.

Reporter: Can you get specific at all?

Gov. Tommy Thompson: We haven't really resolved or made a final decision on it.

We are looking at a lot of legislation this year to protect the citizens...

. . .

Reporter: Rick says if Thompsons's administration gets a law approved restricting the spread of AIDS, he will obey it. But until then he will continue his lifestyle and that includes anonymous sex with other men.

How are you doing that, where all do you have sex?

Rick: Basically, I go to all the bookstores.

Reporter: Bau Claire's adult bookstores show adult movies inside private booths.

But in many of the booths, there are small holes made in the walls. The holes are about waist high off of the floor.

Who do you meet in these rooms?

Rick: I have seen a few married men in there.

Reporter: Do you have most of your sex in adult bookstores?

Rick: Yeah.

Reporter: Is that the easiest way for you to have sex is through these holes?

Rick: Very easy.

. . .

Reporter: You have a hole in one of your booths. Why is that hole there?

Bookstore owner: That hole was there when the booth came down here from Chicago. And it has been there ever since I have had that booth and I have had that booth there since 1984 when they came in here with all that stuff.

Reporter: Glen Peterson runs an adult bookstore in Eau Claire. The hole in one of the booths looks as if a knot of wood was punched out. Peterson said he has tried to block it twice but he has given up because it has been repeatedly removed. Today we told him Rick's story of spreading the virus.

Does that make you want to get rid of the hole more?

Bookstore owner: Yeah. I think that I will make sure I can patch this up good where they can't tear it down again because I don't want to get sued if somebody else catches AIDS over this. So I am going to have to take care of it today, I guess.

Reporter: And although it seems Glen Peterson knows what he is going to do, the City of Eau Claire sure doesn't seem to. City Attorney Ted Fischer says there is no ordinance on the books dealing with the issue at this time, though Milwaukee and St. Paul do. And Councilperson Wally Rogers says it may be up to the Health Board to take action but Health Board President Tom Henry says it might be up to the city to have an ordinance first. We will have more on that as our series continues.

## AMICUS CURIAE

BRIEF

Nos. 87-2012, 87-2051, and 88-49

Supreme Court, U.S.

IN THE

Supreme Court of the United States, spaniol, JR.

OCTOBER TERM, 1989

JUE 21

FW/PBS, INC., et al., Petitioners,

CITY OF DALLAS, et al.,

Respondents.

M.J.R., INC., et al.,

Petitioners.

CITY OF DALLAS, et al.,

Respondents.

CALVIN BERRY, III, et al.,

Petitioners,

CITY OF DALLAS, et al.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE U.S. CONFERENCE OF MAYORS. NATIONAL CONFERENCE OF STATE LEGISLATURES. INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES. NATIONAL GOVERNORS' ASSOCIATION. NATIONAL LEAGUE OF CITIES, AND COUNCIL OF STATE GOVERNMENTS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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#### QUESTIONS PRESENTED

- Whether a city may preclude persons who recently have been convicted of certain specified sexual offenses from operating a sexually oriented business.
- Whether a city may impose special regulations on sexually oriented businesses in an effort to alleviate the secondary effects associated with such businesses, such as increased crime and declining property values.
- Whether the licensing requirements imposed by Dallas on sexually oriented businesses effect an unconstitutional prior restraint.

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### Supreme Court of the United States

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On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE

U.S. CONFERENCE OF MAYORS,

NATIONAL CONFERENCE OF STATE LEGISLATURES,
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
NATIONAL ASSOCIATION OF COUNTIES,
NATIONAL GOVERNORS' ASSOCIATION,
NATIONAL LEAGUE OF CITIES, AND
COUNCIL OF STATE GOVERNMENTS
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

#### INTEREST OF THE AMICI CURIAE

The amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

These cases present First Amendment challenges to the validity of a Dallas ordinance imposing licensing requirements on "sexually oriented businesses." The issues presented are important to amici and their members because they concern the constitutional limitations on state and local government efforts to protect the morals, health, and safety of their citizens from urban blight and crime.

The Court has previously upheld local government regulation directed at the secondary effects of sexually oriented businesses. In City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), the Court upheld zoning restrictions aimed at businesses of this character. See also Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). The licensing requirements in this case represent another attempt to deal with this pernicious problem.

The licensing requirements at issue in this case, although they differ in character from zoning restrictions, impose no greater restrictions on the ability of creators of sexually oriented material to reach their audience or the ability of the public to obtain access to sexually oriented fare. In fact, in many of their applications, these regulations have considerably less direct impact on First Amendment rights than did the zoning regulation upheld in *Renton*; the Dallas ordinance applies to a wide range of business activities, some of which (e.g., adult motels) are completely unconcerned with freedom of expression.

The City's effort is not to restrain speech, but to exercise some control over businesses engaged in the commercial exploitation of sex, and thus to inhibit the criminal activity and health risks frequently associated with such exploitation. The licensing requirements may be compared to similar requirements imposed on other lawful business activities (e.g., liquor stores, dance halls, pawn shops) that can attract criminal elements. They are narrowly tailored to the City's strong public interest in mitigating the undesirable secondary effects associated with such businesses, without inhibiting the freedom to publish or receive, and without attempting to regulate the content of, First Amendment communications. The licensing requirements in this case do not vest in any official discretionary power that could result in censorship or suppression of particular First Amendment expression (cf. City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (1988)).

Amici submit that the decision below is correct. Because this Court's decision will have a direct effect on matters of prime importance to amici and their members, they submit this brief to assist the Court in its resolution of the issues presented.<sup>1</sup>

#### STATEMENT

#### A. Introduction and Description of the Dallas Ordinance

These consolidated cases involve several challenges to the constitutionality of a Dallas ordinance that regulates the conduct of sexually oriented businesses. The ordinance, Chapter 41A of the Dallas City Code (reproduced in its current, amended form at J.A. 8-37), defines the term "sexually oriented businesses" to include the following nine kinds of commercial enterprise: (1) adult arcades; (2) adult bookstores or adult video stores; (3) adult cabarets; (4) adult motels; (5) adult motion picture theaters; (6) adult theaters; (7) escort agencies; (8) nude model studios; and (9) sexual encounter centers. Section 41A-2(19) (J.A. 14) and Section 41A-3 (J.A. 15). The ordinance also defines separately each of these kinds of sexually oriented business. Section 41A-2(1)-(6), (9), (12), and (18) (J.A. 9-13).

<sup>&</sup>lt;sup>1</sup> The parties' letters of consent, pursuant to Rule 36 of the Rules of this Court, have been filed with the Clerk of the Court.

The ordinance requires a license for the operation of sexually oriented businesses and specifically identifies the circumstances in which a license will not be granted. Sections 41A-4 and 41A-5 (J.A. 16-20). The ordinance also limits the locations in which sexually oriented businesses may be conducted (Sections 41A-13 and 41A-14 (J.A. 26-30)), and it establishes particular regulatory requirements for certain kinds of sexually oriented businesses and for the exhibition and display of sexually explicit films, videos, and other materials (Section 41A-15 to 41A-20 (J.A. 30-35)).

The ordinance was originally adopted in June 1986, by unanimous vote of the Dallas City Council, acting on the unanimous recommendation of the Dallas City Plan Commission. Pet. App. 41.2 Public comments at a City Council hearing on the Plan Commission's recommendation unanimously favored adoption of the proposed ordinance. *Ibid*.

The purpose of the ordinance is "to promote the health, safety, morals, and general welfare of the citizens of [Dallas], and . . . to prevent the continued concentration of sexually oriented businesses within the city." Section 41A-1(a) (J.A. 8-9). As the legislative history shows, and as the district court found (Pet. App. 42), Dallas sought to "control[] the secondary effects of sexually oriented businesses on surrounding neighborhoods." In addition, the City sought to protect the patrons of such establishments and the citizenry in general from unsanitary and unsafe conditions. Dallas wished to reduce the crime frequently associated with sexually oriented businesses, to deter the spread of urban blight, and to preserve property values. Id. at 43. The City Council "did not intend to limit access by adults to sexually oriented material protected by the first amendment." Ibid.

#### B. The Initiation of These Consolidated Actions

Immediately after the ordinance was adopted, petitioners sued to enjoin its enforcement. Between June 30 and July 17, 1986, three lawsuits were filed in the United States District Court for the Northern District of Texas.

Plaintiffs in the first case, petitioners in No. 87-2012, are numerous corporations and individuals that operate businesses in Dallas selling, exhibiting, or distributing sexually explicit publications, videotapes, or motion picture films. The businesses operated by these petitioners fall within one or more of several of the categories of sexually oriented businesses enumerated in the Dallas ordinance, including adult arcades, adult bookstores or adult video stores, adult motion picture theaters, and adult theaters.

Plaintiffs in the second case, petitioners in No. 87-2051, are corporations that operate "nightclubs" in Dallas where they present "entertainment programs" that consist of "semi-nude dancing." Amended Complaint ¶¶ 1, 9. The businesses operated by these petitioners fall within the "adult cabaret" category of sexually oriented businesses, as defined in the Dallas ordinance. M.J.R. Br. at 2; J.A. 10.

Plaintiffs in the third case, petitioners in No. 88-49, are owners and operators of motels in Dallas that rent their motel rooms for various periods of time, including two-hour increments. The businesses operated by these petitioners fall within the "adult motel" category of sexually oriented businesses, as defined in the Dallas ordinance. Berry Br. at 4; J.A. 10-11.

Petitioners mounted a blunderbuss constitutional challenge to the ordinance, alleging that nearly every provision in Chapter 41A violates one or more of the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments. The complaint in No. 87-2012, for example, contained more than 80 separate paragraphs or subparagraphs that purported to identify various constitutional flaws in part or all of the challenged ordinance. As the

<sup>&</sup>lt;sup>2</sup> "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 87-2012.

district court observed (Pet. App. 45), however, petitioners' "main attack" focused on the ordinance's zoning restrictions on the location of sexually oriented businesses. Section 41A-13 (J.A. 26-28).

#### C. The District Court's Decision

The district court disposed of all three complaints on cross-motions for summary judgment (Pet. App. 39-70). The court sustained the validity of the Dallas ordinance, with the exception of four relatively minor provisions that have since been deleted or amended and are not at issue here.

Having reviewed the record of the ordinance's consideration by the City Plan Commission and the City Council, the district court found that "[t]he intent of the City in passing the Ordinance was solely to control the secondary effects of sexually oriented speech on the neighborhoods its purveyors inhabit, rather than to eliminate the speech itself" (Pet. App. 42). The court considered the interests that the ordinance was intended to serve, including "crime control, protection of property values, and prevention of urban blight," and found that those interests are "both important and substantial" (id. at 47). The court further found that "[t]he legislative response to the secondary effects of sexually oriented businesses evinced a clear intent to leave alternative avenues open for expression of that genre, while lessening the effects of such businesses on the surrounding community" (id. at 47-48).

Based on these findings, and relying on this Court's decisions in Young v. American Mini Theatres, 427 U.S. 50 (1976), and City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), the district court upheld the zoning restrictions in the Dallas ordinance in their entirety. Pet. App. 48-49. The court also found "no constitutional impediment to the concept of requiring sexually oriented businesses to obtain licenses and pay reasonable fees" (id. at 50; footnotes omitted).

Turning to the specific features of the Dallas licensing scheme, the district court ruled that the ordinance's license eligibility criteria and licensing procedures are generally valid. Pet. App. 50-55.

In particular, the court upheld the basic concept of Section 41A-5(a) (10) of the ordinance, which makes licenses unavailable, for a specified period of years, to persons who have been convicted of any of an enumerated list of felony or misdemeanor offenses.3 The court said that "denial of licensure to those convicted of certain specified crimes that are related to the crime-control intent of the law is undoubtedly permitted" (Pet. App. 53). The court decided, however, that five of the crimes enumerated in the ordinance as originally adopted were not "sufficiently related to the purpose of the ordinance to withstand scrutiny" (ibid.).4 The court also ruled that the ordinance could not properly direct that licenses be withheld from persons "under indictment or misdemeanor information" for (but not recently convicted of) any of the enumerated offenses. Id. at 53-54, 83. A month after the district

<sup>&</sup>lt;sup>3</sup> The waiting period imposed by the ordinance is five years from conviction or release from confinement for felonies and multiple misdemeanor offenses, and two years from conviction or release from confinement for single misdemeanor offenses. Section 41A-5(a) (10) (B) (J.A. 19-20).

<sup>4</sup> The enumerated offenses that the court found "clearly related" to the purposes of the ordinance include prostitution; promotion of prostitution; aggravated promotion of prostitution; compelling prostitution; obscenity; sale, distribution, or display of harmful material to a minor; sexual performance by a child; possession of child pornography; public lewdness; indecent exposure; indecency with a child; sexual assault or aggravated sexual assault; incest, solicitation of a child, or harboring a runaway child; and criminal attempt, conspiracy, or solicitation to commit any of the foregoing. Pet. App. 53; J.A. 19.

The five enumerated offenses that the court found "not sufficiently related" to the purposes of the ordinance were "(1) a controlled substance act violation, (2) bribery, (3) robbery, (4) kidnapping, [and] (5) organized criminal activity" (Pet. App. 53; see also id. at 107).

court's decision, the Dallas City Council amended the ordinance to delete those portions of Section 41A-5(a) (10) that the court had held invalid. Pet. App. 106-107.

With respect to the procedures established by the ordinance for granting or denying sexually oriented business licenses, the district court held that "the largest part of the licensure section is constitutional" (Pet. App. 52). The court explained that, with two minor exceptions, "[t]he findings the police chief must make in licensing sexually oriented businesses are based on objectively determinable facts, and are thus permissible" (ibid.)

The two exceptions to this general conclusion, in the court's view, were Sections 41A-5(a) (8) and 41A-5(c). The first of these provisions required the police chief to deny a license to any applicant who

has been employed in a sexually oriented business in a managerial capacity within the preceding 12 months and has demonstrated that he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner.

(Pet. App. 83; emphasis added). The second provision dealt with license applications from persons convicted of one of the specific offenses enumerated in the ordinance. Under Section 41A-5(c), such a person could be granted a license, after the prescribed waiting period following his conviction, but only if the police chief determined that he was "presently fit" to operate a sexually oriented business. The section listed several factors that the police chief was to consider in making his determination of "present fitness."

The district court found that both Section 41A-5(a) (8) and Section 41A-5(c) required the police chief "to make subjective judgments on the fitness of an applicant" (Pet. App. 51), and the court therefore held that the two subsections "vest unfettered discretion in the police chief, and cannot survive constitutional scrutiny" (id. at 52). Since the district court's decision, the Dallas City Council has deleted the "present fitness" requirement from Sec-

tion 41A-5(c) and has modified Section 41A-5(a) (8) so as to limit the disqualification based on inability to operate a sexually oriented business "in a peaceful and lawabiding manner" to circumstances in which an applicant's recent operation of such a business has "necessitat[ed] action by law enforcement officers." Pet. App. 106, 108-109; J. A. 18, 20.

Finally, the district court rejected numerous vagueness and overbreadth challenges to the ordinance's definitions of the various categories of sexually oriented businesses and other terms, and the court upheld the ordinance's various restrictions on the "operation, layout, design, and furnishing" of regulated businesses. Pet. App. 55-57.

#### D. The Court of Appeals' Decision

The court of appeals affirmed the district court's decision. Pet. App. 1-30. The court began by addressing petitioners' contention that the ordinance's licensing requirement is invalid under *Freedman v. Maryland*, 380 U.S. 51 (1965), because of three alleged procedural deficiencies (Pet. App. 5):

it places the burden of proof upon the licensee to prove that a license was wrongfully denied; it fails to provide for prompt determination of the appeal; and it fails to provide assurance of a "prompt final judicial determination."

In rejecting this argument, the court observed that the Dallas ordinance regulates ongoing commercial enterprises, not the content of individual books or films. Id. at 8-9. Unlike the state statute invalidated in Freedman, which prohibited the exhibition of any motion picture not first submitted to and approved by the State Board of Censors, the Dallas ordinance does not ban the publication, distribution, or exhibition of any film, writing, or other form of expression.

In holding that the Dallas ordinance does not trigger the procedural requirements of Freedman, the court of appeals relied heavily on City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). Pet. App. 7-9. The court observed that the challenged ordinance "regulates only the secondary effects of sexually oriented businesses," and that under *Renton* a city may regulate such secondary effects without engaging in the kind of "content-based" regulation that would activate the procedural safeguards in *Freedman*. Id. at 8.

The court of appeals also sustained the zoning restrictions in the Dallas ordinance. The court found that the ordinance furthers a substantial government interest in maintaining the quality of urban life and that the ordinance "allows reasonable alternative avenues of communication" (Pet. App. 9). Under these circumstances, the court had little difficulty in concluding that the Dallas zoning is valid, under the principles enunciated in Renton.

The court of appeals next rejected challenges to several specific features of the licensing system established by the ordinance. The court characterized the ordinance's prohibition against granting licenses to persons recently convicted of certain enumerated crimes as "a form of disability commonly attending convictions" (Pet. App. 12), and it found that under the amended ordinance "[i] neligibility results only from offenses that are related to the kinds of criminal activity associated with sexually oriented businesses" (id. at 13). Having found that "[t]he relationship between the offense and the evil to be regulated is direct and substantial," the court concluded that the ordinance's mandatory waiting period following an applicant's conviction for an enumerated crime is constitutionally acceptable. Ibid.

Similarly, the court of appeals found no constitutional problem with the degree of discretion exercised by the chief of police under the amended ordinance (Pet. App. 13-14); the authorization in Section 41A-7 for police, health, fire, and building inspections of sexually oriented businesses at any time such a business is "occupied or open for business" (id. at 14); the requirement in Sec-

tion 41A-19 that viewing booths for films and video cassettes be open to direct view from the manager's station (id. at 11); or the classification as an adult motel of any establishment that offers a sleeping room for rent for a period of less than 10 hours (ibid.).

Judge Thornberry concurred in part and dissented in part. Pet. App. 17-30. He dissented only with respect to those sexually oriented businesses that, in his view, "directly implicate the First Amendment, such as the adult book stores, adult video stores, and adult motion picture theaters" (id. at 17). Even as to these businesses. Judge Thornberry dissented from only three aspects of the majority's decision. Although he agreed with the majority that the Dallas ordinance is "contentneutral" because "it can be justified by a desire to fight crime and urban blight-interests unrelated to the suppression of particular speech" (id. at 19-20; see also id. at 23), Judge Thornberry nevertheless sought to distinguish the Dallas licensing system from the zoning ordinance upheld in Renton (id. at 22-23). In his view, "[t]he denial of a license is a complete ban on speech" (id. at 23) and "the classic prior restraint" (id. at 19). For that reason, he concluded, the licensing ordinance cannot be analyzed as a mere "time, place, and manner restriction," and the procedural protections described in Freedman must apply. Id. at 18-19, 23-25.

Judge Thornberry also dissented with respect to Section 41A-7's authorization of inspections of sexually oriented businesses and with respect to the requirement in Section 41A-5(a)(6) that applicants for licenses to operate such businesses be approved by the health, fire, and building departments as being in compliance with applicable law. Pet. App. 25-26. He would have held these provisions unconstitutional because, he said, they are applicable only to sexually oriented businesses, not to businesses generally.

Finally Judge Thornberry would have invalidated Section 41A-5(a) (10), the provision that makes licenses

unavailable for a period of years following an applicant's conviction of any of several enumerated sexual offenses. Pet. App. 27-28. He stated that the burden imposed by this provision is a heavy one and that the restriction should not be permitted in the absence of strong evidence that allowing recently convicted sex offenders to operate sexually oriented businesses would surely result in direct, immediate, and irreparable damage. Id. at 28.

#### E. Proceedings h. This Court

After the court of appeals' decision, petitioners moved in this Court for "recall and stay" of the mandate of the court of appeals. It is not at all clear why petitioners wanted a stay of the mandate. Even before the court of appeals' decision, Dallas was free to enforce its amended ordinance, and the court of appeals' decision did not change the status quo. Staying the mandate therefore should have had no practical effect. Nonetheless, petitioners sought this relief, and, on May 4, 1988, the Court staved the judgment of the court of appeals, "except for its holding that the provisions of the ordinance regulating the location of sexually-oriented businesses do not violate the Federal Constitution" (Pet. App. 38). Although the stay, by its terms, does not seem to limit the City's ability to enforce its ordinance, Dallas appears to have interpreted the stay as an injunction against such enforcement. Since the entry of the stay, therefore, Dallas apparently has enforced only the zoning restrictions, not the licensing provisions, of the disputed ordinance.

In February 1988, this Court granted the petitions for certiorari in all three cases. The Court limited its grant of review so as to exclude those questions in No. 87-2012 and No. 87-2051 that sought to challenge the Dallas zoning restrictions. Pet. App. 7.

#### SUMMARY OF ARGUMENT

Although their arguments are multifarious, petitioners essentially contend that Chapter 41A violates the First Amendment in three ways. First, petitioners argue that the provisions denying licenses to certain convicted criminals infringe a First Amendment right of those criminals to operate sexually oriented businesses. Second, petitioners argue that Chapter 41A as a whole impermissibly treats sexually oriented businesses differently from other businesses through its special licensing and inspection requirements. Finally, petitioners argue that Chapter 41A effects an unconstitutional "prior restraint" on speech both in requiring licenses and in permitting license denial under the circumstances specified in the ordinance.

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Those provisions of the Dallas ordinance that forbid persons recently convicted of certain crimes from operating sexually oriented businesses do not infringe petitioners' First Amendment rights. Chapter 41A was enacted pursuant to the City's police power to regulate for the purpose of protecting and promoting public health and safety. A well-established incident of this police power is the right to bar from certain occupations persons who have committed crimes. Thus, a person responsible for the operation of a sexually oriented business should not have a recent history of committing sex crimes because, as the Dallas City Council found in this case, an individual in such a profession would be faced with repeated opportunities for recidivism.

The First Amendment's principal concern is to protect the freedom to speak and to listen, to read and to write, to express and to receive a broad spectrum of views and messages. The First Amendment is not primarily concerned with protecting the profit-making activities of commercial enterprises. As operators of sexually oriented businesses, petitioners are neither creators nor recipients of expression. They are merely intermediaries, persons seeking to sell sexually explicit materials or performances. But, for First Amendment purposes, one vendor of such fare is the same as the next. Protected material is amply available in Dallas in sexually oriented businesses not operated by convicted criminals.

Furthermore, there is no record that any individual petitioner has been denied a license to operate because he or she has been convicted of one of the enumerated offenses. And, of course, Chapter 41A does not abridge in any way the First Amendment interest of any person, convicted sex offender or not, to create or to receive sexually explicit fare.

Because the restriction against convicted sex offenders affects those persons exclusively and because it affects only their economic interests, the restriction ought to be analyzed under the Equal Protection Clause of the Fourteenth Amendment, not as an infringement of fundamental rights. The "occupational disability" imposed by the Dallas ordinance is rationally related to the legitimate state interest of protecting public safety. Petitioners themselves do not argue to the contrary.

#### II.

Chapter 41A does not impermissibly discriminate against sexually oriented businesses by subjecting them to licensing and other requirements. Such businesses are historically, and on this record, associated with crime, including prostitution, and with casual sexual liaisons that implicate the corresponding health risk of sexually transmitted disease. Thus, the requirement of licensing, regulations governing the layout of booths where sexually explicit videos are shown, and the requirement that sexually oriented businesses permit inspection by police, health, and other municipal departments, are all directly related to the peculiar problems and characteristics associated with sexually oriented businesses.

#### III.

The fact that the Dallas ordinance requires sexually oriented businesses to be licensed and permits applications for such licenses to be denied under specified circumstances does not make Chapter 41A an unconstitutional prior restraint. Impermissible prior restraints fall within one of two categories. Some unconstitutional prior restraints impermissibly vest broad licensing discretion in an official. Others seek to screen protected material, thus allowing censorship. Chapter 41A falls within neither category. No section vests licensing discretion in the licensing official, who is required to issue a license within 30 days if certain objectively ascertainable criteria are met. No section authorizes screening or censorship of sexually oriented speech.

Licenses are denied under Chapter 41A not because of any particular material sold in a sexually oriented business but because of a proprietor's failure to comply with the ordinance. With the exception of the temporary disqualifications applicable to convicted sex offenders, compliance is entirely within the control of the license applicant at the time of application. If an applicant is denied a license, he need only conform to the requirements of Chapter 41A. Accordingly, the procedural requirements mandated when the content of speech or expression is reviewed before publication are not implicated by Chapter 41A.

#### ARGUMENT

I. THE CONSTITUTION DOES NOT CONFER UPON CONVICTED SEX OFFENDERS THE RIGHT TO OPERATE SEXUALLY ORIENTED BUSINESSES

Petitioners first challenge the constitutionality of those provisions of the Dallas ordinance that prevent criminals convicted of certain crimes from obtaining licenses to operate sexually oriented businesses.<sup>5</sup> Petitioners argue

<sup>&</sup>lt;sup>5</sup> In addition to Section 41A-5(a) (10), which makes sexually oriented business licenses unavailable to persons recently convicted of any enumerated offense, Section 41-A-10(b) (5) requires that an

that these provisions effect an "absolute ban upon future protected expression" and that the ordinance therefore "bears a 'heavy presumption against its constitutional validity." M.J.R. Br. at 34 (quoting Vance v. Universal Amusement Co., 445 U.S. 308, 316 n.13 (1980)); FW/PBS Br. at 12-20. But this argument assumes the answer to the question at issue: whether a person recently convicted of one or more sexual offenses has a First Amendment right to operate a sexually oriented business.

#### A. A City's Broad Police Power To Protect The Health And Safety Of Its Citizens Encompasses The Right To Ban Convicted Criminals From Certain Occupations

The offenses that temporarily disable certain recently convicted criminals from obtaining licenses are sexual offenses. They include, *inter alia*, sexual assault, prostitution and related offenses, obscenity, and offenses involving child pornography or sexual activity with children. J.A. 18-19.6 A person convicted of any of these crimes may not obtain a license to operate a sexually oriented business for five years in the case of a felony or multiple misdemeanors, or two years in the case of a single misdemeanor. *Id.* at 19-20.

The Dallas City Council found that the enumerated sex crimes "render a person unable, incompetent, and unfit" to operate a sexually oriented business "in a manner that would promote the public safety and trust" (Pet. App. 74). The reason is that, as a licensed operator, such a person would be faced with "repeated opportunities" to commit additional offenses. *Id.* at 73. Because this would pose a very real threat to public safety

and health, the City Council determined that a temporary disqualification from obtaining a license is desirable. *Id.* at 73-74.

As the City's findings make explicit, the sexually oriented business ordinance was enacted pursuant to the City's police power to regulate certain businesses and professions for the purpose of protecting and promoting public health and safety. Pet. App. 71. A well-established incident of this governmental power is the right to bar from certain occupations or activities persons who have committed certain crimes.

In Hawker v. New York, 170 U.S. 189 (1898), for example, this Court upheld New York State's permanent ban against granting physicians' licenses to persons who had committed felonies. In permitting such disqualification, Hawker relied directly on "'[t]he power of the state to provide for the general welfare of its people.'" Id. at 194 (quoting Dent v. West Virginia, 129 U.S. 114, 122 (1889)). The Court found that it was within the State's police power to "prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine." 170 U.S. at 191.7

The Dallas City Council found a direct relationship between the enumerated offenses and "the ability, capacity, or fitness required to perform the duties and dis-

existing license be revoked if it is determined that the licensee has been convicted of an enumerated offense for which the prescribed waiting period following the conviction has not elapsed. J.A. 23.

<sup>&</sup>lt;sup>6</sup> Each of the offenses enumerated in the Dallas ordinance is defined in the Texas Penal Code, the relevant sections of which are cross-referenced in Chapter 41A.

<sup>&</sup>lt;sup>7</sup> Of course, the legitimate exercise of this aspect of the police power is not restricted to the exclusion of persons from professions involving the provision of health care. This Court has upheld disqualifications of certain classes of persons, including criminals, from other occupations. For example, in New York City Transit Authority v. Beazer, 440 U.S. 568 (1979), the Court sustained the Transit Authority's ban on the employment of drug users, including those on methadone maintenance programs. Similarly, in De Veau v. Braisted, 363 U.S. 144 (1960), the Court upheld a New York law disqualifying convicted felons from waterfront union employment. "Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas." Id. at 158-59.

charge the responsibilities of the licensed occupation" (Pet. App. 73). The City could reasonably conclude that a person responsible for operating a business focused predominantly on sex should not have a recent history of committing sex crimes. "'It cannot be doubted that the legislature has authority, in the exercise of its general police power, to make such reasonable requirements as may be calculated to bar from admission to this profession dishonorable men, whose principles or practices are such as to render them unfit to be trusted with the discharge of its duties." Hawker v. New York, 170 U.S. at 194 (quoting State v. State Medical Examining Board, 32 Minn. 324, 327, 20 N.W. 238, 240 (1884)). See also Richardson v. Ramirez, 418 U.S. 24 (1974) (sustaining one of the many state statutes that deny convicted felons the right to vote).

#### B. The Principal Concern Of The First Amendment Is The Free Flow Of Expression, Not The Commercial Exploitation Of Sexually Explicit Material By Convicted Criminals

Petitioners' challenge to the licensing restrictions that Dallas imposes on certain convicted criminals does not deny the City's legitimate interest in protecting its citizens or the City's power to do so. Indeed, petitioners seem to acknowledge that the City has a "substantial governmental interest in controlling crime" (FW/PBS Br. at 20). Nevertheless, petitioners contend (ibid.), Dallas may not deny licenses to convicted criminals unless the City first shows that direct, immediate, and irreparable damage will result if the ordinance's temporary disqualification is not imposed.

Petitioners try to justify this position by vastly exaggerated assertions of their First Amendment interest in operating sexually oriented businesses. Petitioners repeatedly claim that the ordinance "will result in the absolute suppression of . . . protected First Amendment activity" (id. at 23), but they completely ignore the highly tenuous relationship between their commercial enterprises and the core concerns underlying the First Amendment's guarantees. As the courts below recognized, the Dallas ordinance should be evaluated on the basis of a realistic appraisal of its practical effects, not on the basis of petitioners' inflated rhetoric.

While the ordinance has little or no impact on any legitimate First Amendment interest of convicted criminals, it contributes substantially to the City's salutary goals of protecting the health and welfare of the public, reducing crime, and preserving property values. The ordinance imposes no restriction whatever on the right of convicted criminals or members of the public generally to send or receive any message they wish. Neither creators nor consumers of expression are affected. Any tangential First Amendment interest that petitioners may have in the commercial exploitation of sexually explicit materials by convicted criminals cannot displace the City's indisputable substantial interest in regulating sexually oriented businesses for the common good.

The First Amendment was designed to protect the right of a creator to reach his audience. "The central concern of the First Amendment . . . is that there be a free flow from creator to audience of whatever message a film or a book might convey." Young v. American Mini Theatres, Inc., 427 U.S. 50, 77 (1976) (Powell, J., concurring); see also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976) ("the protection afforded is to the communication, to its source and to its recipients both"). The constitutional guarantee of free speech "'was fashioned to assure umfettered interchange of ideas for the bringing about of political and social changes desired by the people." New

<sup>\*</sup> Notwithstanding petitioners' argument to the contrary (M.J.R. Br. at 23-24, 27-33), this rule is equally applicable when the crime in question is obscenity, rather than a crime that directly threatens the physical safety of the public. Like the other enumerated offenses, the crime of obscenity involves past conduct that the Dallas City Council could reasonably find renders a person unfit to sell sexually explicit material. Certainly, the operation of sexually oriented businesses provides "repeated opportunities" to commit the crime again.

York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

Outlets where protected material may be sold and purchased may be necessary for the "free flow of information from creator to audience." It is, however, a giant step from this point to petitioners' premise that all persons, including recently convicted sex offenders, must have an unqualified right to sell all materials arguably entitled to First Amendment protection.

Here, it is uncontested that there are ample outlets in Dallas for persons to purchase sexually explicit books or films or to watch live or filmed performances of similar content. This is therefore not a case about whether certain information or expression may be disseminated. The issue is solely whether persons recently convicted of particular crimes may operate a particular kind of commercial enterprise.

Young v. American Mini Theatres is instructive in this regard. There, the Court sustained an ordinance that forced the relocation of two "adult" movie theatres. The Court rejected the argument that the ordinance created an impermissible restraint on protected communications, noting that "[t]here is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to sat sfy its appetite for sexually explicit fare."

427 U.S. at 62. No such claim exists on this record either.

Petitioners (and the criminals they seek to protect) are neither creators nor consumers of expression. They are intermediaries engaged in the business of selling sexually oriented material, for the sole end of making money. Petitioners, like the adult movie theater operators in American Mini Theatres, are nothing more than "commercial purveyors[s]. They do not profess to convey their own personal messages through the movies they show, so that the only communication involved is that contained

in the movies themselves." 427 U.S. at 78 n.2 (Powell, J., concurring).

The First Amendment is not concerned with commercial selling for its own sake.

The inquiry for First Amendment purposes . . . looks only to the effect of this ordinance upon freedom of expression. This prompts essentially two inquiries: (i) Does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom they desire, and (ii) does it restrict in any significant way the viewing of these movies by those who desire to see them? . . . At most the impact of the ordinance on these interests is incidental and minimal.

Young v. American Mini Theatres, 427 U.S. at 78 (Powell, J., concurring). As Justice Powell's opinion makes clear, any significant First Amendment concern with ordinances regulating the commercial distribution of sexually explicit fare must focus on the rights of the creators of such material and their audience. The Dallas ordinance temporarily bars some convicted criminals from operating sexually oriented businesses, but for First Amendment purposes the important point is that sellers are fungible. And there is an ample number of such sellers in Dallas.

By petitioners' own admission (FW/PBS Br. at 6), the only showing on this record is that one out of 165 license applicants was denied a license because of an obscenity conviction, and that denial was reversed by the Permit and License Appeal Board. Two out of 165 applicants had their licenses revoked because of obscenity convictions, and 147 out of 165 license applications were granted. Affidavit of Steven Foster (submitted to this Court as an attachment to the City's response to petitioners' application for stay and recall of mandate).

<sup>&</sup>lt;sup>9</sup> Contrary to petitioners' suggestion (FW/PBS Br. at 7), the Foster affidavit does not describe the disposition of the remainder of the 165 license applications.

The Dallas ordinance therefore does not have the effect of suppressing or restricting access to lawful speech. See Young v. American Mini Theatres, 427 U.S. at 71 n.35 (plurality opinion). "Viewed as an entity, the market for this commodity is essentially unrestrained." Id. at 62 (opinion of the Court).

#### C. The Occupational Disability Created By Chapter 41A Constitutes A Permissible Statutory Discrimination

Because it affects only former criminals and is imposed because of their particularly demonstrated threat to society, and because it affects not their right to free speech but only their economic interests, the temporary "occupational disability" imposed by Chapter 41A is properly analyzed under the Equal Protection Clause of the Fourteenth Amendment and not as an infringement of fundamental rights.<sup>10</sup>

In the areas of economics and social welfare, a classification will be upheld if it has some reasonable basis and if it bears a rational relationship to a permissible state objective. Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974); Dandridge v. Williams, 397 U.S. 471, 485 (1970). "[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." McGowan v. Maryland, 366 U.S. 420, 425 (1961). "'A statutory discrimination will not be set aside [under the Equal Protection Clause] if any state of facts reasonably may be conceived to justify it." Dandridge v. Williams, 397 U.S. at 485 (quoting McGowan v. Maryland, 366 U.S. at 426). This standard "has consistently been applied to state legislation restricting the availability of employment opportunities." Dandridge v. Williams, 397 U.S. at 485. Thus, in New York City Transit Authority v. Beazer, 440 U.S. 568 (1979), this Court upheld, as consonant with the Equal Protection Clause, the New York City Transit Authority's ban on the employment of drug users, including those on a methadone maintenance program.

[T]he "no drugs" policy now enforced by TA is supported by the legitimate inference that as long as a treatment program (or other drug use) continues, a degree of uncertainty persists. Accordingly, an employment policy that postpones eligibility until the treatment program has been completed, rather than accepting an intermediate point on an uncertain line, is rational. It is neither unprincipled nor invidious in the sense that it implies disrespect for the excluded subclass.

Id. at 591-92 (footnote omitted). Similarly, in Hawker v. New York, 170 U.S. at 196, the Court found that:

When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character, it is not laying down an arbitrary or fanciful rule, one having no relation to the subject matter, but is only appealing to a well-recognized fact of human experience; and if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the state?

Petitioners do not and could not contend that the provisions of Chapter 41A temporarily disqualifying persons convicted of sexual offenses from operating sexually oriented businesses are not "rationally related" to the legitimate state interest of protecting public safety. The correlation between sexually oriented businesses and an increased incidence of crime is well established, as the

<sup>&</sup>lt;sup>10</sup> Cf. Lewis v. United States, 445 U.S. 55, 67 (1980) (characterizing 18 U.S.C. § 1201's prohibition of possession of firearms by felons to be a "civil firearms disability, enforceable by a criminal sanction").

Dallas City Council found. That should be the end of the matter. "It is by . . . practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered." Railway Express Agency v. New York, 336 U.S. 106, 110 (1949).

#### II. CHAPTER 41A DOES NOT IMPERMISSIBLY DIS-CRIMINATE AGAINST SEXUALLY ORIENTED BUSINESSES

Petitioners also argue that Chapter 41A impermissibly treats sexually oriented businesses differently from other businesses, thus allegedly imposing a "content based" restriction on the exercise of First Amendment rights. This Court's recent decision in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), effectively answers this contention.

In Renton, the Court reviewed a zoning ordinance that applied exclusively to adult motion picture theaters. Relying on Young v. American Mini Theatres, the Court held that, "at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." 475 U.S. at 49. In the Court's view, even though the ordinance singled out adult theatres for regulation, it was nevertheless appropriate to test the ordinance's validity under a content-neutral standard. The Court explained that "the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are justified without reference to the content of the regulated speech." Id. at 48 (quoting Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. at 771) (emphasis in Renton).

The same reasoning applies here. As the Dallas City Council made clear, Chapter 41A was motivated by a desire to regulate the secondary effects of sexually oriented businesses, not by a desire to muzzle a particular kind of speech. The ordinance's focus on businesses that purvey a certain kind of material therefore does not discriminate impermissibly against a form of expression protected by the First Amendment.

Chapter 41A imposes nothing more than reasonable time, place, and manner restrictions on sexually oriented businesses. With the exception of the temporary disqualification of certain convicted criminals, no ordinance section provides for denial of a license on grounds that cannot be avoided or cured by a license applicant at the time of application. Such "content-neutral" time, place, and manner regulations "are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." City of Renton v. Playtime Theatres, Inc., 475 U.S. at 47. Chapter 41A satisfies both of these criteria.

As discussed above, Chapter 41A was designed to serve the substantial state interest of protecting public health and safety. Here, as in Renton (see 475 U.S. at 51), the City acted on the basis of substantial evidence concerning the adverse secondary effects of sexually oriented businesses. And Chapter 41A leaves open ample alternative avenues of communication. The ordinance does not restrict in any way the number or kind of sexually oriented businesses that may operate. Nor does it attempt to regulate the protected material that may be sold there. Under the standards enunciated in Renton, the Dallas ordinance should be sustained.<sup>11</sup>

<sup>&</sup>lt;sup>11</sup> With respect to petitioners in No. 88-49, operators of "adult motels," the argument that Chapter 41A impermissibly discriminates against sexually oriented businesses fails for an additional and perhaps even more fundamental reason. The regulation of such businesses does not implicate First Amendment concerns at all, and special licensing requirements for motels that rent rooms for periods shorter than ten hours cannot possibly be "content based." Renting a motel room for a two-hour interval is not itself expression, and the fact that people may associate with each other

Petitioners' attempted reliance on Minneapolis Star v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983), is misplaced. There, the Court "struck down a tax imposed on the sale of large quantities of newsprint and ink because the tax had the effect of singling out newspapers to shoulder its burden." Arcara v. Cloud Books, Inc., 478 U.S. 697, 704 (1986). The Court found the newsprint and ink tax unconstitutional because "differential treatment, unless justified by some special characteristic . . ., suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." 460 U.S. at 585.

Here, although Chapter 41A obviously "singles out" sexually oriented businesses for regulation, the differential treatment imposed by the ordinance upon such businesses is "justified by some special characteristic." It is in fact justified by several "special characteristics" associated with sexually oriented businesses, including increased crime, increased incidence of sexually transmitted disease, diminished property values, and urban blight. Pet. App. 72-73. The affected entities here are businesses historically associated with crime and other adverse secondary effects, not newspapers historically associated with free speech. Significantly, petitioners have not challenged the City Council's findings, based on "convincing documented evidence." that sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution, and for casual sexual liaisons, that "a substantial number of arrests for sexual crimes have been made" in such establishments,

and that such businesses are associated, among other things, with increased crime. Pet. App. 71-72.

The same rationale also answers petitioners' challenge to the "open booths" section of the ordinance, Section 41A-19 (J.A. 32-35), and the municipal code compliance and administrative inspection sections, Sections 41A-5 (a) (6) and 41A-7 (J.A. 21). As the court of appeals held, "[t]he City could reasonably conclude that closed booths encourage illegal and unsanitary sexual activity in adult theatres." Pet. App. 11. Similarly, the fact that sexually oriented businesses often are open late at night and at odd hours justifies the provision permitting inspections at any time the business is open, rather than only during the hours when most other businesses are open.

#### III. CHAPTER 41A DOES NOT IMPOSE AN UNCON-STITUTIONAL PRIOR RESTRAINT

Petitioners' briefs are laden with rhetoric regarding the Dallas ordinance's alleged unconstitutional prior restraint on protected speech. The kernel of petitioners' argument is that all laws that require licenses and that permit license denial are presumptively unconstitutional prior restraints. See, e.g., M.J.R. Br. at 10-12, 16, 22.

Petitioners are incorrect. "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957). The Constitution does not require absolute freedom to exhibit protected material at all times and places. See Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952). As the Court held in Young v. American Mini Theatres, "[t]he mere fact that the commercial exploitation of material protected by the First Amendment is subject to . . . licensing requirements is not a sufficient reason for invalidating these ordinances." 427 U.S. at 62.

Every one of the cases that petitioners cite regarding unconstitutional prior restraints can be distinguished from this case on one of two grounds. Some unconstitu-

or express themselves inside a motel room does not mean that the City may not legitimately decide that motels that permit short-term rentals require special regulation. The Dallas ordinance imposes no limits on either "intimate association" or "expressive association," as those terms have been used in this Court's recent decisions, and the ordinance's application to adult motels therefore raises no constitutional issue. See City of Dallas v. Stanglin, 109 S. Ct. 1591 (1989); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

tional prior restraints impermissibly vest broad licensing discretion in an official who has the power unilaterally to revoke or deny a license on bases not articulated in the licensing legislation or not verifiable by reference to objective facts. E.g., City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (1988); Lovell v. City of Griffin, 303 U.S. 444 (1938). Other unconstitutional prior restraints require screening and thus threaten to exclude potentially protected material without certain procedural safeguards, such as expeditious judicial review of any such exclusion. E.g., Freedman v. Maryland, 380 U.S. 51 (1965). The problems inherent in each of these kinds of prior restraint are absent from Chapter 41A.

The Dallas ordinance does not vest impermissibly broad discretion in any licensing official. Under Section 41A-5, the licensing official is required to approve the issuance of a license within 30 days unless he finds one or more of several objectively ascertainable facts. J.A. 17-20. Similarly, under Section 41A-9 (J.A. 22-23), which governs suspension of licenses, and under Section 41A-10 (J.A. 23-25), which governs license revocation, the licensing official must suspend or revoke the license involved if he finds any of the objectively ascertainable ordinance violations specified in those sections.

Petitioners object in particular to Section 41A-5(a) (8), which, as amended after the district court's decision, requires the denial of a license application filed by a person who, while employed in a sexually oriented business during the 12 months before the application, "has demonstrated that he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner, thus necessitating action by law enforcement officers" (J.A. 18). See M.J.R. Br. at 41-42. Petitioners' argument that this provision permits the exercise of unbridled discretion ignores the section's final clause: "thus necessitating action by law enforcement officers."

This language, which was added to Section 41A-5(a) (8) after the district court invalidated the original ver-

sion of that provision, follows the same approach that the City adopted in the original version of the corresponding license suspension provision, Section 41A-9(5), a provision that the district court expressly sustained. Pet. App. 65 n.29. The district court specifically suggested that the excessive discretion found in the original version of Section 41A-5(a) (8) could be cured by amending the provision to require "action by law enforcement officers." as in Section 41A-9(5). Pet. App. 66 n.31. That is exactly what the Dallas City Council did. Id. at 106. The resulting provision does not confer unfettered discretion: it is "limited by its language to certain objective indications of an ability to operate a business peacefully" (id. at 65 n.29). Petitioners have not identified a single instance of allegedly improper discretionary action under this or any other provision of the ordinance.

Nor is Chapter 41A objectionable as a prior restraint that screens potentially protected speech. In Arcara v. Cloud Books, Inc., an "adult bookstore," where solicitation of prostitution and other forms of illicit sexual activity had been found to have occurred, was closed under a New York nuisance statute. This Court overturned the New York Court of Appeals' finding that the closure order constituted a prior restraint. The Court explained (478 U.S. at 705 n.2):

The closure order sought in this case differs from a prior restraint in two significant respects. First, the order would impose no restraint at all on the dissemination of particular materials since respondents are free to carry on their bookselling business at another location . . . Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited—indeed, the imposition of the closure order has nothing to do with any expressive conduct at all.

Like the closure order upheld in Arcara, Chapter 41A does not prohibit or restrain the dissemination of par-

ticular materials or any materials at all. <sup>12</sup> It follows that any license revocation or denied in Dallas would be based not upon the dissemination of protected materials but upon noncompliance with the provisions of Chapter 41A. That is precisely the kind of situation in which the special procedural requirements outlined in *Freedman v. Maryland*, 380 U.S. 51 (1965), are not implicated.

#### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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<sup>12</sup> Petitioners seize upon Arcara's observation that "respondents are free to carry on their bookselling business at another location" (emphasis added). Petitioners argue that, as to those convicted criminals who may not operate a sexually oriented business for up to five years, the ordinance clearly effects a prior restraint. FW/ PBS Br. at 23; M.J.R. Br. at 23-27. As already discussed, however, and as the quoted language from Arcara implies, the First Amendment protects materials offered for sale, not a convicted criminal's right to operate a sexually oriented business. In Near v. Minnesota, 283 U.S. 697 (1931), a prior restraint statute forbidding a publisher from issuing future editions of his newspaper both suppressed the newspaper and "put the publisher under an effective censorship." Id. at 712. Here, neither publisher nor publication is being suppressed or censored. The Dallas ordinance does not in any way restrict publication by particular persons or the sale of specific materials. The only thing foreclosed is operation of a sexually oriented business by persons recently convicted of certain sexual offenses. Any materials that could be sold by such a person can, of course, also be made available in sexually oriented businesses operated by persons who have not been convicted.

# AMICUS CURIAE

## BRIEF



Supreme Court, U.S. FILED

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### Supreme Court of the United States OCTOBER TERM, 1989

FW/PBS, INC., et al.,

Petitioners.

V.

CITY OF DALLAS, TEXAS, et al.,

Respondents.

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF RESPONDENT, CITY OF DALLAS, TEXAS

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BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF RESPONDENT, CITY OF DALLAS, TEXAS

#### INTEREST OF THE AMICUS CURIAE

This brief Amicus Curiae is filed pursuant to Rule 36 of the rules of this Court on behalf of the more than 1,900 local governments that are members of the National Institute of Municipal Law Officers (NIMLO).

NIMLO is a national organization comprised of municipalities and local government units, which are political subdivisions of states. NIMLO is operated by the chief legal officers of its members, variously called city attorney, county attorney, city or county solicitor, corporation counsel, director of law, or any one of some twenty other titles. The Respondent, City of Dallas, Texas, is a member of NIMLO. The accompanying brief is signed by the municipal attorneys constituting the governing body of NIMLO, both on behalf of NIMLO and on behalf of each of their own cities.

The attorneys who operate NIMLO for their local governments are responsible for advising their city governments on the best legal methods to promote the health, safety and weight of their citizens and on the regulation of business enterprises, such as sexually oriented businesses. These attorneys also represent their governments in litigation resulting from the enforcement of safety and business regulations, such as the sexually oriented business licensing ordinance before this Court. The United States Court of Appeals for the Fifth Circuit has upheld the validity of the City of Dallas ordinance.

NIMLO believes that the decision of the Fifth Circuit properly recognizes a municipality's broad power to regulate business operations to promote the health, safety and welfare of its citizens. NIMLO, therefore, urges the affirmance of the decision of the United States Court of Appeals for the Fifth Circuit.

Consent to filing of this brief has been granted by Petitioners and by Respondents. Copies of the letters granting consent have been lodged with the Court.

#### STATEMENT OF THE CASE

Amicus adopts the statement of the case and the facts as presented by Respondent, City of Dallas.\*

#### SUMMARY OF THE ARGUMENT

The City of Dallas ordinance temporarily disqualifying an applicant from obtaining a sexually oriented business license if the applicant or the applicant's spouse has a prior sex crime conviction is a valid content-neutral time, place and manner restriction. Dallas, just as Detroit, Michigan, Renton, Washington and a host of other cities, is attempting to alleviate the undesirable secondary effects of sexually oriented businesses. City officials relied on studies showing a significant correlation between higher crime rates and the presence of sexually oriented businesses. It is abundantly clear from the documentary evidence presented in the case that the City's intent in passing the ordinance was to address the crime rate, property value decline and urban blight associated with sexually oriented businesses and not the content of the speech involved. Since there is a direct and substantial relationship between the sex crime offenses listed in the Dallas ordinance and the sex crime rate associated with sexually oriented businesses, the ordinance passes constitutional scrutiny under the test for content-neutral time, place and manner restrictions.

Prior opinions of this Court have validated the right of the government to attach employment disabilities, such as revocation of a movie house license and disqualification from holding office in waterfront labor organizations, to criminal convictions. In choosing to address this problem by temporarily barring criminal convicts from operating sexually oriented businesses, Dallas has chosen a method with a long history of use at the state and federal levels.

The appeal procedures provided under Section 41A-11 of the Dallas ordinance provide adequate procedural safeguards to guarantee that the content-neutral time, place and manner licensing provision does not act as a prior restraint on speech. The licensing provision is not directed at the content of the

This case has been consolidated by order of the Court with the following cases: MJR, Inc. v. City of Dallas, No. 87-2051 and Berry v. City of Dallas, No. 88-49.

speech and therefore need not meet the stricter standard applicable to content-based restrictions.

#### ARGUMENT

- I. DALLAS' SEXUALLY ORIENTED BUSINESS LI-CENSE ORDINANCE IS CONSTITUTIONAL UNDER PRIOR DECISIONS OF THIS COURT.
  - A. THE ORDINANCE IS A VALID CONTENT-NEU-TRAL TIME, PLACE AND MANNER RESTRIC-TION.

In 1972, the City of Detroit adopted licensing and zoning ordinances that forbade adult motion picture theaters and adult bookstores from locating within 1.000 feet of any two other "regulated uses" or within 500 feet of a residential area. The passage of these ordinances, which effectively required the dispersal of such businesses, was an attempt by the City to forestall the development of so-called "skid row" neighborhoods. The Detroit Common Council took note that the number of such establishments had increased significantly in recent years as well as the opinions of urban planners and real estate experts that the concentration of adult businesses in the same neighborhood tends to cause an increase in crime and adversely affects property values. Young v. American Mini Theatres, 427 U.S. 50, 54-55 (1976). Upon challenge by adult movie theater operators, this Court ultimately upheld the validity of the ordinances. Noting that the Common Council, in passing the ordinances, was exclusively concerned with the secondary effects of adult businesses, such as crime and neighborhood deterioration, and not with the content of the speech being purveyed, Young at 71, n.34 (plurality opinion); at 81, n.4 (Powell, J., concurring), this Court reviewed the ordinances under the standards applicable to content-neutral time, place and manner regulations. Granting high respect to the city's interest in preserving the quality of its urban life, Young at 71, this Court held that such interest in the present and future character of its neighborhoods adequately supported the content-based classification of the ordinances in conformance with the First and Fourteenth Amendments. Young at 72-73 (plurality opinion); at 84 (Powell, J., concurring).

In 1981, the City of Renton, Washington adopted an ordinance that effectively concentrated adult motion picture theaters, requiring that they locate at least 1,000 feet from residential zones, family dwellings, churches, parks and schools. The City Council based its decision on a review of experiences of other cities that illustrated the adverse impact of adult businesses. Renton v. Playtime Theaters, Inc., 475 U.S. 41, 44 (1986). Just as it had in Young to years earlier, this Court upheld the validity of the Renton ordinance. Recognizing that the ordinance was designed to prevent crime, maintain property values and generally preserve the quality of urban life, not to supress expression, Renton at 48, this Court analyzed it as a content-neutral time, place and manner regulation. Finding that the Renton ordinance represented a valid governmental response to a serious problem, this Court held that "Here, as in American Mini Theatres, the city has enacted a zoning ordinance . . . satisfying the dictates of the First Amendment." Renton at 54-55.

Now, three years after *Renton*, the Court is again faced with a challenge to a sexually oriented business ordinance. The specific provision at issue in the instant case provides that an applicant for a sexually oriented business license is temporarily disqualified from obtaining a license if the applicant or the applicant's spouse has a prior conviction involving any of the enumerated crimes. Dallas, Texas, Code Sections 41A-5, 41A-10.

The City of Dallas, just as Detroit and Renton and a host of other cities across the nation, was endeavoring to deal with the problems engendered by sexually oriented businesses.1 Both the Dallas City Plan Commission and the Dallas City Council reviewed and relied upon studies conducted by other cities, all of which concluded that sexually oriented businesses were associated with an increase in crime rates and a decrease in property values. See Defendants' Exhibit (DX) 6 (Austin), DX7 (Indianapolis), DX8 (Houston), DX9 (Beaumont), DX10 (Amarillo), DX11 (Los Angeles), DX12 (Phoenix), DX13 (Las Vegas) and DX14 (Seattle). In addition, a study of a section of Dallas with a high concentration of sexually oriented businesses indicated that, in 1985, the crime rate in that area was 90 percent higher than in the city as a whole. DX20. The affidavit of the drafter of the ordinance indicates that the intended purpose of the ordinance was to minimize the adverse secondary effects of sexually oriented businesses. Specifically, her concerns were to protect against increased crime rates, to deter the spread of urban blight, and to preserve property values and the quality of life. DX3, at 1.

It is clear from the foregoing that the City of Dallas was concerned with the secondary effects of sexually oriented businesses, and not the content of the speech involved, when it decided to impose a temporary bar to entry into the business on those previously convicted of sexually oriented crimes. It is equally clear that the ordinance meets the content-neutral time, place and manner test as set forth in *Young* and *Ren*-

oriented businesses are sex-related crimes. As the court below noted, the ordinance only disqualifies applicants convicted of criminal offenses associated with sexually oriented businesses, takes into account the seriousness of the offenses, and lifts the temporary disability once enough time has passed to indicate that the former offenders are no longer criminally inclined. FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1305 (5th Cir. 1988). Because a direct and substantial relationship exists between the offense (conviction of a sex crime) and the evil to be regulated (sex crime activity associated with adult businesses), the appellate court held that the ordinance passes constitutional muster. FW/PBS, Inc., 837 F.2d at 1305.

The situation in the instant case is analogous to that in Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986). In Arcara, a state public nuisance law required the temporary closure of an adult bookstore because of the occurrence of illicit sexual activity on the premises. As the trial court below noted: "If violation of law by a licensee may permissibly justify closure, it follows inescapably that one who has been convicted of a sex-related crime may be denied licensure." Dumas v. City of Dallas, 648 F.Supp. 1061, 1074 n.34 (N.D. Tex. 1986). The purpose and intent — prevention of crime — is the same in each case.

#### B. A CITY MAY LAWFULLY CONSIDER PRIOR CRIMINAL HISTORY IN ITS SEXUALLY ORIENTED BUSINESS LICENSING SCHEME

Prior opinions of this Court have validated the right of the government to attach employment disabilities to criminal convictions. In a Fifth Circuit decision which this Court let stand, the appellate court upheld the authority of local government officials to revoke a movie house license for showing obscene

<sup>&</sup>lt;sup>1</sup>Although compilation of statistics illustrating the proliferation of adult businesses is difficult due to the nature of the business, ample evidence exists showing the expansion of the pornography business in the last three decades. *See* U.S. Department of Justice, Attorney General's Commission on Pornography, Final Report 1353-1367 (1986).

films in violation of state law. 106 Forsyth Corporation v. Bishop, 482 F.2d 280 (5thCir. 1973), cert. denied, 422 U.S. 1044 (1975). Such action by local officials does not violate the right of free speech vouchsafed under the First Amendment. 106 Forsyth Corporation, 482 F.2d at 281. The non-exhibition of films during the revocation period would not be the direct or indirect result of previous restraint but would result incidentally from past criminal activity — showing obscene films. 106 Forsyth Corporation v. Bishop, 362 F.Supp. 1389, 1397 (1972).

This Court has upheld a state law disqualifying convicted felons from holding office in waterfront labor organizations. DeVeau v. Braisted, 363 U.S. 144 (1960). In DeVeau, this Court noted that there is a long history of state and federal laws barring convicted felons from certain employments to insure against corruption in specified, vital areas. The City of Dallas and countless other cities nationwide have identified the crime rate associated with sexually oriented businesses as a vital concern which needs to be addressed. In choosing to address this problem by temporarily barring criminal convicts from operating sexually oriented businesses, Dallas has chosen a method with a long history of use at the state and federal levels.

#### C. THE ORDINANCE PROVIDES ADEQUATE PROCEDURAL SAFEGUARDS.

Section 41A-11 of the Dallas ordinance provides that a party aggrieved by a denial, suspension or revocation of a license by the chief of police may appeal the decision to a permit and license appeal board. The appeal stays the suspension or revocation until the board makes a final decision. The appeal process provides sufficient safeguards to guarantee that the content-neutral time, place, and manner licensing provision does not act as a prior restraint on speech.

Both Freedman v. Maryland, 380 U.S. 51 (1965), and Vance v. Universal Amusement Co., Inc., 445 U.S. 308 (1980), are distinguishable from the case at issue. In each of these cases, the government regulation was directed at the content of the speech. The state statute involved in each case authorized the prevention of the showing of motion pictures alleged to be obscene without providing for prompt final judicial review. An invalid prior restraint on protected speech was clearly effected in both situations. In contrast, as the court below held:

[T]he Dallas Ordinance, like the Ordinance before the court in *Renton*, regulates only the secondary effects of sexually oriented businesses. For this reason, the Ordinance need only meet the standards applicable to time, place and manner restrictions and need not comply with *Freedman's* more stringent limits on regulations aimed at content.

FW/PBS, Inc., 837 F.2d at 1303.

#### CONCLUSION

The authority for, and desirability of, local regulation of sexually oriented businesses in order to prevent their detrimental secondary effects is beyond dispute. Licensing requirements are an extremely efficient means of achieving this end. Disallowance of the City of Dallas' sexually oriented business license ordinance would seriously impair the ability of municipalities to combat the crime, deterioration and blight that sexually oriented businesses engender. For the foregoing reasons, it is urged that this Court affirm the decision of the Fifth Circuit Court of Appeals and uphold the Respondent's ordinance as a constitutional exercise of the City's police power to ef-

fectuate legitimate governmental interests and protect the safety and welfare of its citizens.

Respectfully submitted,

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